Supreme Court, U.S.
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No. 98-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BRUCE C. BEREANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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January 20, 1999

105 pp

QUESTIONS PRESENTED

In 1987, this Court held that the federal mail fraud statute requires a deprivation of money or property. *McNally v. United States*, 483 U.S. 350 (1987). In response, in 1988, Congress enacted a one-sentence statute that criminalizes, under the mail fraud statute, a "depriv[ation]" of the "intangible right of honest services" of "another." 18 U.S.C. § 1346. This Court has not considered the validity, meaning, or scope of Section 1346.

The questions presented are:

1. Whether 18 U.S.C. § 1346 applies to private contractual relationships.

2. Whether the "intangible right of honest services" in 18 U.S.C. § 1346 must be defined by state law, and if not, whether a defendant nevertheless may offer evidence of the meaning of, and compliance with, pertinent state law.

3. Whether contemplation of harm is a necessary component of mail fraud and an issue for which victim testimony is relevant.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bruce C. Bereano petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The court of appeals' judgment is reported at 161 F.3d 3 (table), and the court of appeals' unpublished opinion is reprinted in the Appendix, App., *infra*, 1a-43a. Pertinent district court opinions also are reprinted, *id.* at 44a-63a.

JURISDICTION

The court of appeals' judgment was entered on August 28, 1998. App., *infra*, 1a. Petitioner's timely petition for rehearing with a suggestion for rehearing *en banc* was denied on October 22, 1998. *Id.* at 64a-65a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 1341 and 1346 of title 18 of the United States Code are reprinted, App., *infra*, 66a.

INTRODUCTION

This case raises fundamental questions concerning the efficacy, meaning, and scope of the "honest services" amendment to the federal mail fraud statute, enacted by Congress in 1988 in response to *McNally v. United States*, 483 U.S. 350 (1987).

Petitioner was prosecuted for depriving "another" of the "right to honest services" in the context of private contractual relationships. The "right" was not defined by state (or federal) law; petitioner was denied the opportunity to establish the meaning of pertinent state law and his compliance with it; and all four of the alleged victims testified that petitioner had rendered outstanding "services," and that they had not been cheated, defrauded, or victimized.

McNally sharply curtailed the expansive use of the mail fraud statute as a means of federal prosecution under an "intangible rights" theory. This Court repudiated the courts of appeals' judge-made "intangible rights" doctrine, and construed the statutory language narrowly, in part to avoid the serious federalism and fair notice problems that would be raised by a broad interpretation. 483 U.S. at 360-61. Congress was required to legislate with greater precision.

McNally, 483 U.S. at 360 ("If Congress desires to go further, it must speak more clearly than it has"; Congress must speak "in clear and definite language").

In 1988, Congress enacted a one-sentence statute in response to *McNally*, which consists, in its entirety, of the following twenty-seven words:

> "For purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

18 U.S.C. § 1346. This criminal statute does not define the critical phrase "intangible right of honest services." It does not explain which "intangible" rights are protected; does not identify the source of the pertinent "right"; and does not illuminate the category of "services" at issue. It also does not identify the "another" who holds the pertinent "services," or explain the necessary relationship between the defendant and the "another"; nor does it specify the actions that lead to a "depriv[ation]" of the "intangible right."

Resolution of uncertainty by this Court is both necessary and appropriate. Courts of appeals have struggled to interpret the statutory language in attempting to discern its meaning and scope. One important concern involves the application of this statute to private contractual arrangements. *United States v. Frost*, 125 F.3d 346, 365 (6th Cir. 1997) ("[E]nforcement of an intangible right of honest services in the private sector . . . has a much weaker justification" than it does in the public sector), *cert. denied*, 119 S. Ct. 40 (1998); *United States v. Cochran*, 109 F.3d 660, 667 (10th Cir. 1997) ("Assuming without deciding that § 1346 has application where a private actor or quasi-private actor is deprived of honest services in the context of a commercial transaction, it would give us great pause if a

right of honest services is violated by every breach of contract or every misstatement made in the course of dealing."); *United States v. Sun-Diamond Growers of California*, 138 F.3d 961, 973 (D.C. Cir.) ("In the private sector context, § 1346 poses special risks."), *cert. granted on other grounds*, 119 S. Ct. 402 (1998); *United States v. Jain*, 93 F.3d 436, 441-42 (8th Cir. 1996) ("[T]he transition from public to private sector in th[e] context [of § 1346] raises troublesome issues."), *cert. denied*, 117 S. Ct. 2452 (1997).

Courts of appeals likewise have struggled to resolve the appropriate role of state law in Section 1346 prosecutions. Indeed, the courts of appeals are squarely divided over the appropriate role of state law in Section 1346 prosecutions. One court, sitting en banc, has held that a violation of state law is essential in a Section 1346 case because it represents an important constraint on the "intangible right of honest services" crime. *United States v. Brumley*, 116 F.3d 728, 734 (5th Cir. 1997) (*en banc*) (holding that Section 1346 "contemplates that there must first be a breach of a state-owed duty"), *cert. denied*, 118 S. Ct. 625 (1998). Another court — the court of appeals that rendered the decision in this case (App., *infra*, 19a) — has held that Section 1346 does *not* require a violation of state law. *United States v. Bryan*, 58 F.3d 933, 940-41 (4th Cir. 1995); *see also United States v. Sawyer*, 85 F.3d 713, 726 (1st Cir. 1996) (holding that, "[i]n general," Section 1346 does not require a violation of state law, but that, because the parties agreed that the indictment required a state law violation, such a violation had to be proven). In *McNally* itself, moreover, this Court emphasized the importance of state law in an "intangible rights" prosecution. 483 U.S. at 361 n.9.

This case highlights fundamental problems with Section 1346, and vividly illustrates the danger of prosecutorial

overreaching concerning its use. The case involves a federal mail fraud prosecution regarding private contractual relationships. It concerns descriptions in invoices sent by a lobbyist to four of his clients. According to the government, petitioner deprived his clients of their "intangible right of honest services" by describing four $150 charges as "legislative entertainment" when, in fact, the money was used for political contributions. *All* four of the clients — the holders of this "intangible right of honest services" that allegedly was the object of petitioner's "depriv[ation]" — testified at trial that petitioner rendered exemplary services, and that they had not been cheated, defrauded, or victimized. As the district court stated, "[w]e have four clients, all called by the government . . . each of whom says they perceive no fraud, did not then, do not now." JA 996.[1] The district court itself found the alleged fraud "thin" and "obscure," "arguable," and "clearly atypical." *Id.* at 996, 1298, 1337.

The prosecution proceeded, moreover, without any requirement that the "right of honest services" be tethered to a violation of state law. Instead, highlighting the pervasive confusion concerning the appropriate relationship of state law to Section 1346, the government was permitted to introduce evidence of petitioner's supposed *understanding* of state law in an effort to prove his intent, but petitioner was precluded from introducing evidence concerning the actual *meaning* of state law, and his compliance with it.

This case also presents the fundamental issue in mail fraud prosecutions whether contemplation of harm is necessary — an issue that has split the courts of appeals.

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[1] "JA" refers to the Joint Appendix filed in the court of appeals.

App., *infra*, 8a-10a. In addressing this issue, the court of appeals created still another conflict by holding that victims' testimony that they were not harmed is "ultimately *irrelevant*" to that inquiry. *Id.* at 10a (emphasis added).

The questions presented are of substantial and recurring importance, and warrant review by this Court.

STATEMENT OF THE CASE

I. Pre-Trial Proceedings

In May 1994, a grand jury indicted Bruce C. Bereano, a prominent (and sometimes controversial) Maryland lobbyist, on eight counts of mail fraud, in violation of 18 U.S.C. §§ 1341 and 1346. JA 16-28. The indictment's allegations were based on four $150 charges to four of his clients: (1) Phillips Publishing, Inc. ("Phillips"); (2) the Maryland Saltwater Sportfisherman's Association ("MSSA"); (3) the Medical Mutual Liability Insurance Society of Maryland ("Medical Mutual"); and (4) Dental Benefit Providers ("Dental Benefit"). The eight counts consisted of four pairs of related mailings — for each client, one count rested on petitioner's mailing of the bill, and one count rested on the client's payment of the bill. JA 21-28.[2]

According to the indictment, petitioner deprived his clients of "their right to [his] loyal, faithful, honest, and unbiased service" (§ 1346) and of "money and property" (§ 1341). JA 18 ¶ 7. The indictment alleged generally that petitioner asked employees of his firm and family members to make political contributions to his political action

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[2] Although the indictment alleged that petitioner defrauded clients of "approximately $16,000" (JA 20-21 ¶ 18), the eight counts concerned only the $600, and the evidence did not establish more than $600. App., *infra*, 36a.

committee; reimbursed those employees and family members with firm checks that contained false notations as to their true purpose; and billed those reimbursement payments to his lobbying clients, on a pro-rata basis, as "legislative entertainment." *Id.* at 18-20.

The indictment was replete with references to state law. It stated that petitioner was "registered as a lobbyist with the Maryland State Ethics Commission" and was "required to file reports with the Commission" (JA 16 ¶ 2); that a Maryland election law statute "prohibited any individual or corporate entity from contributing in excess of a total of $2,500 to any group of candidates in any primary or general for public office in the state of Maryland and prohibited any individual or corporate entity from contributing in excess of $2,500 to any Maryland state political action committee in any primary or general election" (JA 17-18 ¶ 6); and that, among other things, the scheme enabled petitioner to "conceal the true identities of the actual contributors of campaign funds," "make political contributions in excess of the limitations imposed by Maryland state election law," "cause candidates to file false campaign finance reports, thereby concealing the true identity of the contributor to the candidate's campaign," and "cause his own lobbying activity reports to be false" (*id.* at 20-21 ¶ 18).

Petitioner moved to dismiss the indictment on the ground that it rested on a serious misinterpretation of state election law. JA 43. He also moved to dismiss the Section 1346 charges on the ground that those charges were unconstitutionally vague and that Section 1346 is limited to public officials. *Id.* at 42-43. The district court denied the motion. App., *infra*, 62a-63a. Regarding the state law claim, it agreed with the government that, under controlling Fourth Circuit precedent, no violation of state law is

necessary for a mail fraud prosecution, including Section 1346, and therefore, any misstatement of state election law was irrelevant. *Id.* at 56a-59a. It noted, however, that evidence of petitioner's *understanding* of state election law could be used to prove his intent or motive. *Id.* at 57a. Regarding Section 1346, the court held that the statute had revived pre-*McNally* case law and that its criminal proscriptions extend to private relationships. *Id.* at 53a-55a.

Petitioner subsequently filed a motion to reconsider with regard to the court's ruling on the role of state law. JA 410-17. Petitioner emphasized that a state law violation was a "necessity" in the context of this case. *Id.* at 414. The court denied the motion. *Id.* at 603.

Shortly before trial, the government filed a motion in limine to preclude petitioner from introducing evidence of the actual meaning of state election law and his compliance with it; petitioner opposed this motion. The court ruled for the government, holding again that (1) the actual meaning of state law was not at issue because a violation of state law is not necessary for a mail fraud violation; (2) the government could introduce evidence of petitioner's *understanding* of state law to prove intent or motive; and (3) petitioner could not introduce evidence concerning the actual *meaning* of state law and his compliance with it. App., *infra*, 46a-47a.

II. The Trial

At trial, the government introduced testimony from all four of the clients whose "intangible right of honest services" was at issue — specifically, Stephen Peck of Phillips; Dale Dirks and Richard Novotny of the MSSA; Stephen Carney of Medical Mutual; and Edward Murphy of Dental Benefit. JA 798-983. All of these clients testified that they were entirely satisfied with petitioner's services

and did not consider themselves cheated or harmed.[3] All testified that petitioner had achieved remarkable success in helping to present their views to the legislature — obtaining equitable tax treatment for computerized mailing lists for Phillips (*id.* at 822-23); helping to communicate the need to preserve rockfish from commercial fishing for the MSSA (*id.* at 904-05, 940-41); assisting in tort reform and other legislation for Medical Mutual (*id.* at 870-71); and protecting dental managed care plans from protectionist efforts to curb them for Dental Benefit (*id.* at 951-52). All also testified that petitioner's service was characterized by unselfish commitment and devotion.[4] All further testified that petitioner's duties including assisting them in strategies for political contributions, such as providing lists of suggested contributions.[5]

The government also elicited testimony that the clients' understanding of their contracts with petitioner was that the contract included fees and expenses, and that reimbursements for political contributions were not authorized as "legislative entertainment."[6] All of these witnesses testified that, although they were aware of the government's charges against petitioner, they did not feel in the least bit defrauded or victimized by petitioner's billings. JA 840-41, 880-83, 929-30, 943-46, 977. One individual

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[3] JA 823, 869-70, 895-96, 929, 936, 943-46, 977.

[4] JA 824 ("Bruce has a high passion for his work and his clients."); 895 (describing petitioner's "loyal[ty] to the interest of Medical Mutual" and explaining that "he worked hard" for the organization); 942 (petitioner "taught me a lot"); 951 (petitioner "essentially worked himself out of a job" by his dedication and success).

[5] JA 809, 886, 913-14, 968-69.

[6] JA 817-18, 862-63, 917-18, 970-71.

allegedly deprived of his "right" to honest services — Mr. Carney of Medical Mutual — emphasized that he was so satisfied with petitioner's services that he had just retained him for the coming Maryland legislative session, despite the pending criminal charges and imminent trial. *Id.* at 894-95. Another purported victim — Mr. Novotny of MSSA — characterized the $150 charge as "insignificant," "peanuts," "immaterial," at most an entry in the "wrong column" that did not bother him. *Id.* at 943-44. Mr. Carney of Medical Mutual likewise expressed his view that, in light of "the amount of money involved and the time that has passed since we received this bill," the $150 charge was "just not significant to our operations." *Id.* at 884.

At the close of the government's case, petitioner moved for a judgment of acquittal. JA 984-95. After considering the motion, Judge Nickerson explained that he was deeply troubled by the case, but he decided to submit the case to the jury. *Id.* at 996-98. Judge Nickerson also expressed concern regarding the extent of evidence about state law in light of his rulings that the *meaning* of state law — and petitioner's compliance with it — were not at issue in the case. *Id.* at 997. He ultimately redacted some of the indictment's references to state law. *Id.* at 1037-39. Furthermore, he instructed the jury that a violation of state law was not necessary for a mail fraud violation, and that the jury could convict based on a deprivation of a right of honest services *or* a deprivation of money-or-property. Trial Tr. 1698.

On November 30, 1994, the jury returned a verdict of guilty on all eight counts. JA 1116. The court entered a post-verdict judgment of acquittal on one count because use of the mails had not been proved. *Id.* The court again reiterated that it was troubled by the "unique[ness]" of this

case, and by the "thin and obscure," "relatively slight," and "de minimis" nature of the evidence. *Id.* at 1109-11.

During the sentencing proceeding, all four alleged "victims" submitted letters to the court re-emphasizing that they had not been cheated, defrauded, or victimized, and that petitioner had rendered excellent services. JA 1174-78. Indeed, one of the "victims" continued to retain petitioner even after his convictions. *Id.* at 1175. At sentencing, the court downwardly departed, in part because this was "a clearly atypical fraud case" (*id.* at 1298), and imposed a sentence of community confinement, probation, community service, and a fine. *Id.* at 13-15. The court granted petitioner's motion for a stay of sentence pending appeal, reiterating that this was "a close case" and emphasizing that "whether fraud [is] truly sufficiently defined in the context of a case like this is arguable." *Id.* at 1337.

III. The Court of Appeals' Decision

Petitioner appealed, arguing that Section 1346 does not apply to private relationships and that the statute is unconstitutionally vague. App., *infra*, 13a-18a. He also objected to the district court's resolution of state law issues, and maintained that the court erroneously precluded him from introducing evidence of the actual meaning of state election law and his compliance. *Id.* at 4a, 19a-21a; Pet. C.A. Br. 26-27. He further maintained that mail fraud requires contemplation of harm to victims, and that the testimony of the "victims" squarely precluded such a finding. App., *infra*, 8a-12a.

A divided panel (consisting of two district court judges and one appellate court judge) affirmed. App., *infra*, 2a,

40a-41a.[7] The court concluded that the statute is "not limited to public officials" and "is not too vague to put [petitioner] on notice of the charges he faces." *Id.* at 14a, 17a.

The court then rejected petitioner's arguments concerning state law. It reemphasized its prior holding in *Bryan* that a state law violation is not necessary in a Section 1346 prosecution. App., *infra*, 19a. The court concluded that the admission of the government's evidence regarding petitioner's purported *understanding* of state law was "a close question," but that "any possible error was harmless." *Id.* at 20a-21a. The court did not address petitioner's argument that he had been unfairly denied an opportunity to prove the actual meaning of state law, and his compliance with it. *Id.* at 4a; Pet. C.A. Br. 26-27.

The court recognized a split in the courts of appeal as to whether contemplated harm is necessary, but stated that, even if required, it was present here. App., *infra*, 8a-10a. In reaching this conclusion, the court rejected petitioner's reliance on the victims' testimony that they had not been harmed, and held that "[t]he perception of the victim or target of the scheme is ultimately *irrelevant* to whether [petitioner] devised a scheme, or acted with the requisite intent to defraud." *Id.* at 10a (emphasis added).

The court also rejected petitioner's argument that the district court should have conducted an individualized voir

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[7] The case initially was argued before a different panel of two district judges and one appellate judge (CA Reh. Pet. 3); after one of the district judges died, the case was reargued to a new panel, apparently due to a 1-1 split between the two remaining judges. 4th Cir. I.O.P. 36 ("If a panel is reduced to two and the two cannot agree . . . the case will be reargued before a new three-judge panel.").

dire because of extensive negative publicity about his work as a lobbyist, including his work on behalf of politically unpopular clients such as the tobacco industry. App., *infra*, 28a-31a; *see also* JA 93-220.[8] The court further rejected petitioner's objection that the government impermissibly read grand jury testimony to the jury that had not been admitted into evidence or shown to any witness at trial (*id.* at 6a, 31a-34a); one judge dissented and would have reversed on that ground. *Id.* at 41a-43a.[9]

REASONS FOR GRANTING THE WRIT

The issues presented in this petition — the efficacy, meaning, and scope of the congressional response to *McNally* — are of fundamental and recurring importance to the proper administration of the federal mail fraud statute, a commonly-utilized criminal statute with potentially limitless application. This case, moreover, vividly illustrates the need for this Court to review these issues.

In response to *McNally*, Congress enacted a cryptic, one-sentence statute that criminalizes a scheme to defraud that "deprive[s]" "another" of the "intangible right" of "honest services." Remarkably, Section 1346 — a *criminal* statute — neither defines the "honest services" that are protected, nor identifies the source of the protected "intangible right,"

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[8] The extensive pre-trial publicity about petitioner included coverage of his representation regarding the award of a state lottery contract (JA 162-99), a controversial representation that generated the government's protracted investigation of petitioner (*id.* at 396), but resulted in no charges.

[9] Acting on the government's cross-appeal, the court also reversed the district court's downward departure. App., *infra*, 37a-40a. Subsequently, the district court re-sentenced petitioner to a term of confinement and home detention, followed by probation, and a fine.

nor otherwise explains who is "another" that may be considered a victim of the alleged fraudulent scheme (and a holder of the "intangible right" to the "honest services"). Numerous courts of appeals have expressed concern over the application of this terse and enigmatic statutory language to private contractual arrangements. *See, e.g., Sun-Diamond*, 138 F.3d at 973; *Frost*, 125 F.3d at 365; *Cochran*, 109 F.3d at 667; *Jain*, 93 F.3d at 441-42; *see also* John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 Am. Crim. L. Rev. 427, 430 (1998). In addition, the courts of appeals are sharply divided over the role of state law in prosecutions under Section 1346. *Compare Brumley*, 116 F.3d at 734 *with Bryan*, 58 F.3d at 940-41 *and Sawyer*, 85 F.3d at 726, 731. Review by this Court thus is warranted to clarify these issues and to provide lower courts with much-needed guidance over the scope and meaning of this nebulous statutory language.

Furthermore, the question whether contemplated harm is a requirement is central to mail and wire fraud prosecutions. This issue has generated a split within the courts of appeals. App., *infra*, 9a-10a. The court of appeals' effort to avoid confronting this question by holding "irrelevant" the testimony of the purported victims regarding their lack of harm (*id.* at 10a) itself generates a stark — and equally fundamental — split on a common issue under the mail and wire fraud statutes: the *relevance* of victim testimony regarding harm from an alleged scheme to defraud.

I. THIS COURT SHOULD REVIEW THE APPLICABILITY OF SECTION 1346 TO PRIVATE CONTRACTUAL RELATIONSHIPS.

The extension of Section 1346 to private contractual relationships raises important and unresolved questions that

warrant this Court's review. Courts have emphasized the "special risks" and "troublesome issues" presented by the expansion of Section 1346 beyond the confines of public corruption. *Sun-Diamond*, 138 F.3d at 973; *Jain*, 93 F.3d at 441-42. Such a radical expansion of federal criminal jurisdiction — potentially extending to every private relationship in the United States, based on the prosecutor's perception of a deprivation of the "intangible right of honest services," even if there is no deprivation of money or property — is unwarranted by the statutory language, by settled principles of statutory interpretation, and by the constitutional problems that would result from such an interpretation. At a minimum, the question warrants this Court's review to address a fundamental issue that has led numerous courts of appeals to express concern about the reach of this statute to the private sector. *See, e.g., Sun-Diamond*, 138 F.3d at 973; *Frost*, 125 F.3d at 365; *Cochran*, 109 F.3d at 667; *Jain*, 93 F.3d at 441-42.

This case squarely presents this vitally important threshold issue. The court of appeals upheld the applicability of the "honest services" statute to the private contractual relationships at issue. Indeed, unlike other private sector Section 1346 cases involving employer-employee or corruption-of-employee relationships,[10] this case arises solely in the context of contractual relationships between a lobbyist and four of his clients. The "depriv[ation]" of private "services" at issue, moreover, relates solely to the accuracy and adequacy of the description of individual expense items in invoices to clients who expressed complete satisfaction with the pertinent services.

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[10] *Sun-Diamond*, 138 F.3d at 973; *Frost*, 125 F.3d at 365; *United States v. Gray*, 96 F.3d 769, 772 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1275 (1997).

1. The statutory language of Section 1346 does not justify the conclusion that Congress authorized federal prosecutors — and federal courts — to monitor private contractual relationships and mete out federal criminal penalties for a perceived "depriv[ation]" of "honest services" to private parties. In *McNally*, this Court emphasized that the applicability of an "intangible rights"/honest services theory to *public officials* required an especially clear statement, in part because of fair notice and federalism concerns. 483 U.S. at 360-61. Applicability of such a theory of federal criminal prosecution to the *private sector* requires, if anything, even greater clarity. This Court repeatedly has emphasized that the regulation of corporate and business relationships primarily is a function of state law. *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 89 (1987). A federal intrusion into areas of traditional state concern, moreover, generally requires a particularly clear statement of congressional intent. *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991).[11] Whatever else can be said about Section 1346 — with its bare references to "another" and an "intangible right of honest services" — it plainly fails to provide such a clear, precise, and explicit statement.

The important differences between public officials and the private sector highlight the need for clarity in applying this federal criminal statute to private sector relationships. Even recognizing the enormous difficulties with the applicability of "honest services" to state and local public officials, *see McNally*, 483 U.S. at 360, the uncertainty and ambiguities are multiplied exponentially in the private

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[11] *See also, e.g., Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786 (1991); *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 91-92 (1984).

sector. The range and variety of private sector relationships — and of the expectations that the parties bring to such relationships — are extremely diverse. *See, e.g., Carpenter v. United States*, 484 U.S. 19, 25 (1987) (noting, in the wake of *McNally*, that a party's "contractual right" to "honest and faithful service" is "too ethereal in itself" to fall within the protection of the mail fraud statute); *United States v. Chestman*, 947 F.2d 551, 567-71 (2d Cir. 1991) (*en banc*), *cert. denied*, 503 U.S. 1004 (1992); Coffee, 35 Am. Crim. L. Rev. at 436-44. Invoking the bludgeon of federal criminal law to regulate, at the federal level, such diverse private relationships throughout the United States is deeply troubling, especially given the vague, amorphous, and open-ended language of Section 1346. Nothing in the statutory language evinces the requisite clarity for such a conclusion.

2. Some courts of appeals, including the court in this case (App., *infra*, 13a-14a), have decided that application of Section 1346 to the private sector is warranted principally because (1) Congress "overturned" *McNally* and "restored" pre-*McNally* case law, and (2) some pre-*McNally* decisions upheld private sector "intangible rights"/honest services prosecutions. *See Bryan*, 58 F.3d at 941-42; *Frost*, 125 F.3d at 370-71. This reliance on pre-*McNally* case law to justify application of Section 1346 to the private sector, however, is inadequate and unavailing.

First, for purposes of criminal liability, it is important to construe the statute that Congress actually enacted. Congress did not pass a statute that said "we hereby revive pre-*McNally* case law." The words that Congress used in Section 1346 matter — they constitute the basis for federal criminal liability — and they must be construed on their own terms.

Second, it is, at the very least, debatable whether Congress has the power simply to "revive" decisions that rested on an erroneous interpretation of the then-existing statute. "[T]here is no federal common law of crimes," *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181 (1994), and mere congressional restoration of federal judicial interpretations of a prior statute — which this Court has rejected as based on an erroneous interpretation of the then-existing statute — is of questionable validity.

Third, in any event, "restoration" of pre-*McNally* "intangible rights"/honest-services case law fails to provide the necessary congressional clarity; that repudiated body of decisions itself contains hosts of internal conflicts, and would require, if applicable, further decisional refinement. *See, e.g., Brumley*, 116 F.3d at 733 ("[B]efore *McNally*, the doctrine of honest services was not a unified set of rules" and Congress "could not have intended to bless each and every pre-*McNally* lower court 'honest services' opinion").[12]

Fourth, although some pre-*McNally* "intangible rights" decisions concern the private sector, the doctrine principally has been applied to the public sector. Indeed, the case law contains authority expressly limiting the doctrine to abuse of *public office*, including the court of appeals' decision in

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[12] Courts of appeals are divided on the proper role of pre-*McNally* case law. *Compare Frost*, 125 F.3d at 364 ("[Section] 1346 has restored the mail fraud statute to its pre-*McNally* scope, according to previous opinions interpreting the intangible right to honest services.") *with United States v. Sancho*, 157 F.3d 918, 922 (2d Cir. 1998) ("What the government must prove . . . is defined by Section 1346 — not by judicial decisions that sought to interpret the mail and wire fraud statutes prior to the passage of § 1346."); *see also United States v. Bloom*, 149 F.3d 649, 656-57 (7th Cir. 1998) (Section 1346 liability may not extend beyond boundaries established by pre-*McNally* cases).

McNally itself.[13] Under settled principles, conflicts in this prior case law should be resolved in favor of lenity in interpreting the statute (*infra*, p. 21); accordingly, this criminal statute should not be interpreted to apply to the private sector.

3. Even if Section 1346 applies to the private sector, its application in this context is inappropriate. This case arises solely in the context of private contractual relationships, rather than the employer-employee context at issue in three Circuit decisions upholding private sector prosecutions under Section 1346. *Sun-Diamond*, 138 F.3d at 973-74; *Frost*, 125 F.3d at 363-70; *United States v. Gray*, 96 F.3d 769, 777 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1275 (1997). In addition, this case involves a lobbyist-client relationship in which there is *no* analogous precedent, either before or after *McNally*;[14] and it involves a unique private sector context — petitioning the government and contributing to political campaigns — that is closely regulated by states and suffused with First Amendment

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[13] *See United States v. Gray*, 790 F.2d 1290, 1295 (6th Cir. 1986) ("[M]isconduct of a fiduciary in the administration of exclusively private matters in his capacity as a private individual which does not involve the misuse of public office or public trust, *is not actionable under the mail fraud statute under an intangible rights theory.*") (emphasis added), *rev'd on other grounds sub nom. McNally v. United States*, 483 U.S. 350 (1987).

[14] The only lobbyist case cited by the government below was a pre-*McNally* "intangible rights" prosecution in which the indictment alleged — *not* (as here) that the lobbyist defrauded his *clients* — but rather, that the lobbyist deprived the citizenry of its intangible right "to know who made what political payments to whom." *United States v. Buckley*, 689 F.2d 893, 898 (9th Cir. 1982), *cert. denied*, 460 U.S. 1086 (1983); *see also, e.g., Sawyer*, 85 F.3d at 725-26 (Section 1346 case involving allegations that a lobbyist corrupted state legislators; vacating mail fraud convictions).

concerns (*infra*, p. 27). Accordingly, Section 1346 should not apply in this case.[15]

4. The sparse legislative history, moreover, cannot supply the necessary statutory clarity for this breathtaking expansion of federal criminal power. *See McNally*, 483 U.S. at 360 (requiring "clear and definite language" in the statute); *United States v. Bass*, 404 U.S. 336, 349 (1971) (in enacting criminal legislation, Congress must "convey[] its purpose clearly"). As this Court has stressed in other contexts, legislative history cannot supply plain-statement clarity that is lacking in the statutory text. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 39 (1992) ("[T]he 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report.").[16]

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[15] The use of a "fiduciary" or "principal-agent" label does not mitigate these concerns. *See, e.g., Chestman*, 947 F.2d at 567-71 (discussing range of fiduciary relationships); *United States v. Margiotta*, 688 F.2d 108, 142 (2d Cir. 1982) (Winter, J., dissenting) (emphasizing "the degree to which fiduciary obligations vary from relationship to relationship"), *cert. denied*, 461 U.S. 913 (1983); App., *infra*, 14a.

[16] Even if legislative history could supply the necessary clarity — which it cannot — it would fail to do so here. There is no pertinent committee report from either the House or the Senate; no hearing in either body considered the language ultimately enacted by Congress (although a hearing on responding to *McNally* was held); and the only contemporaneous legislative comments, which focused largely on public sector corruption, included references only to employer-employee and organizational-leader-to-organization relationships in the private sector — neither of which is apposite here, *see* 134 Cong. Rec. H11,251 (Oct. 21, 1988) (Conyers); *see also* 134 Cong. Rec. S17,376 (Nov. 10, 1988) (Biden) (post-enactment statement). The ultimate statutory language, moreover, was added as a last-minute, close-of-session floor amendment to the "'amendment-ridden' election-year Anti-Drug Abuse Act of 1998," Moohr, *Mail Fraud and the Intangible Rights Doctrine*, 31 Harv. J. on Legis. 153, 169 (1994) — circumstances that weigh against a sweeping statutory interpretation. *See*

(Continued...)

5. To the extent that there is any ambiguity, the rule of lenity requires that the statute be construed so that it does not apply to private sector relationships. *See, e.g., Bass*, 404 U.S. at 347 ("[A]mbiguity concerning the ambit of [a] criminal statute[] should be resolved in favor of lenity."); *Crandon v. United States*, 494 U.S. 152, 158 (1990) (applying this "time-honored interpretive guideline" in construing narrowly a criminal statute).

6. Application of Section 1346 to private sector relationships also would raise serious constitutional concerns. *First*, such an interpretation would violate the fundamental due process principle of fair notice — that "[n]o man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Lanier*, 117 S. Ct. 1219, 1225 (1997); *see also McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.) ("[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.").[17]

Second, such an interpretation would violate core principles of federalism. *McNally*, 483 U.S. at 360 (broad construction of Section 1341 would "leave[] its outer boundaries ambiguous and involve[] the Federal Government in setting standards" governing state and local relationships); *Brumley*, 116 F.3d at 734 (broad reading of Section 1346 threatens to "erode our federalist structure").

(...Continued)
Rewis v. United States, 401 U.S. 808, 812 (1971); *Brumley*, 116 F.3d at 745 (Jolly, J., dissenting).

[17] The "fair warning" requirement also embodies an important separation-of-powers principle: the "deference due to the legislature, which possesses the power to define crimes and their punishment." *Lanier*, 117 S. Ct. at 1225 n.5.

Third, Congress has no authority to impose sweeping federal criminal penalties for *private sector* relationships throughout the nation, based on the tenuous principle of a deprivation of an "intangible right" of private sector "honest services." Congressional authority for the mail fraud statute traditionally has been thought to rest on the Postal Power (Art. I, § 8, cl. 7). *See Badders v. United States*, 240 U.S. 391, 393 (1916); *Ex Parte Jackson*, 96 U.S. 727, 732 (1877). The remote link between the Postal Power and the possible intrusion into every private sector relationship in the nation is simply too attenuated to justify such a radical assertion of congressional power. To the extent that the Commerce Clause (Art. I, § 8, cl. 3) is invoked as a source of authority, that power also is inadequate to justify such a sweeping assertion of federal criminal authority over private sector "honest services" relationships. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995).[18]

7. As a matter of statutory interpretation, the statute thus should be construed to avoid these constitutional difficulties. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1989). To the extent that Section 1346 nevertheless is construed to apply to the private sector, petitioner's constitutional rights have been violated in this case because petitioner was deprived of fair notice and because Congress lacked power to adopt this far-reaching expansion of federal prosecutorial power.

In sum, the applicability of Section 1346 and the "intangible rights"/honest services doctrine to the private

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[18] The Guarantee Clause (Art. IV, § 4) also was invoked in consideration of Section 1346, *e.g.*, 134 Cong. Rec. at H11,251 (Conyers); that basis, of course, is inapplicable to authority to regulate the *private sector*.

sector has troubled numerous courts of appeals; goes far beyond the use of "intangible rights" prosecutions in the *public sector* that generated this Court's fair notice and federalism concerns in *McNally*; and represents a startling incursion of federal prosecutorial power into private sector relationships on the basis of a perceived "depriv[ation]" of "honest services." The issue warrants review by this Court.[19]

II. THIS COURT SHOULD REVIEW THE ROLE OF STATE LAW IN SECTION 1346 CASES.

The role of state law in Section 1346 prosecutions raises important questions that merit review. Indeed, courts of appeals are sharply divided on the fundamental question whether, in a Section 1346 prosecution, the government must prove a violation of state law establishing and defining such a "right." *Compare Brumley*, 116 F.3d at 734 ("We decide today that services must be owed under state law and that the government must prove in a federal prosecution that they were in fact not delivered.") *with Bryan*, 58 F.3d at 940 ("[T]he fact that a scheme to defraud may or may not violate state law does not determine whether the scheme is within the proscription of the mail fraud statute.") *and* App., *infra*, 20a (same). Even if a state law violation is not required, moreover, an important question is whether a defendant in a Section 1346 prosecution may present evidence of his

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[19] If the Section 1346 basis for petitioner's conviction is legally flawed, petitioner's convictions cannot stand because the jury was charged with the Section 1341 and 1346 theories in the alternative (Trial Tr. 1696, 1698), and a conviction may not rest on an erroneous legal basis. *See, e.g., Sun-Diamond*, 138 F.3d at 972; *United States v. Barona*, 56 F.3d 1087, 1097-98 (9th Cir. 1995), *cert. denied*, 516 U.S. 1092 (1996); *United States v. Tomblin*, 46 F.3d 1369, 1385-86 (5th Cir. 1995); *United States v. Garcia*, 992 F.2d 409, 415-16 (2d Cir. 1993). To the extent that the court of appeals' opinion suggests otherwise (App., *infra*, 18a), that suggestion conflicts with these decisions.

compliance with relevant state law — and the actual meaning of relevant state law — as a defense to the charges.

This case squarely presents these important issues. In conflict with the Fifth Circuit, the court of appeals held that no state law violation was required for a Section 1346 violation. App., *infra*, 19a. This case, moreover, illustrates the need for review regarding the role of relevant state law even in the absence of such a requirement.

1. The requirement of a violation of state law defining a pertinent "right" is a critical limitation on the reach of Section 1346. This constraint is rooted, first, in the statutory language. The statute criminalizes the deprivation of a "*right*." 18 U.S.C. § 1346 (emphasis added). The ordinary meaning of a "right" is a legal entitlement, and the ordinary source for such an entitlement is an external, readily ascertainable body of existing law. The "right" concerns "services," moreover, and the regulation of legal rights-to-"services" ordinarily is governed by state law. *See Brumley*, 116 F.3d at 734 ("[T]he most natural reading" of the "plain language" is that a state law violation is required; court will not "lightly infer" intent to "leave to [federal] courts and prosecutors" the power to define covered "services").

The constraint of a state-law violation is further rooted in the constitutional problems that would result from the failure to require such a violation. These concerns again include (1) fair notice (because, if state law is not the source of the "right" to the "services" at issue, the source of the right is amorphous and undefined); (2) separation-of-powers (because prosecutors and courts, rather than legislatures, would give meaning to the pertinent "right" to "services"); (3) federalism (because state law would be disregarded in determining the "right" to "services" for purposes of federal

criminal prosecutions); and (4) a lack of congressional power and authority for such free-wheeling federal prosecutorial authority. *See generally Brumley,* 116 F.3d at 733-36; Coffee, 35 Am. Crim. L. Rev. at 452-54, 461-65. Accordingly, if the statute is interpreted not to require a state law violation, it would violate these constitutional principles.

Some courts, including the court of appeals in this case (App., *infra*, 19a), have reached the opposite conclusion from *Brumley*, holding that a violation of state law is *not* a necessary component of a Section 1346 prosecution. *Bryan*, 58 F.3d at 940 (rejecting the argument that Section 1346 prosecutions require a violation of state law); *Sawyer*, 85 F.3d at 726, 731. The *Bryan* court, however, rests this conclusion on the mistaken view that Section 1346 simply resuscitated the case law that this Court found erroneous in *McNally*, and that pre-*McNally* case law did not require a state law violation. *Bryan*, 58 F.3d at 940. As discussed, *supra*, pp. 17-19, this reliance on a revival of the repudiated case law should not substitute for a careful explication of the statute enacted by Congress. The statutory text of Section 1346 must control, rather than a general restoration of case law (which had adopted an erroneous interpretation of the then-existing statute).[20]

In *McNally* itself, moreover, this Court emphasized that, "if state law expressly permitted or did not forbid" the "intangible rights" conduct at issue, then "it would take a much clearer indication" in the federal statute that such conduct was "forbidden under federal law." 483 U.S. at 361

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[20] Here too, pre-*McNally* case law includes support for petitioner's position. *See, e.g., United States v. Pisani*, 773 F.2d 397, 409 (2d Cir. 1985) (reversing mail fraud convictions because no state law violation was established). Under principles of lenity (*supra*, p. 21), a state law violation thus is required.

n.9. Section 1346 fails to provide such requisite clarity of intent for the dislodging of state law. Indeed, in rejecting a state law requirement, the Fourth Circuit erroneously dismissed this Court's stated concern in *McNally* as "dicta." *Bryan*, 58 F.3d at 940 n.1. As this Court emphasized in *McNally*, however, congressional intent to override state law defining non-money or property "intangible rights" — by replacing the constraints of relevant state law with the view of federal prosecutors (and courts) regarding the content of the "intangible right of honest services" — requires great clarity (483 U.S. at 361 n.9); Section 1346 fails to provide it.

2. Even if a state law violation is not necessary for a Section 1346 prosecution, the role of state law under Section 1346 warrants review. At the very least, since a purported "intangible right of honest services" is at issue, the defendant must be given an opportunity to prove that his actions complied with relevant state law defining legal "rights" and obligations.

The disturbing treatment of state law in this case demonstrates the rampant confusion about the role of state law in Section 1346 prosecutions. As noted, while the government was permitted to introduce evidence of petitioner's alleged *understanding* of pertinent state law in an effort to show motive and intent, petitioner was precluded from introducing evidence concerning the actual *meaning* of state law and his compliance with it. App., *infra*, 4a, 19a-21a; 46a-47a. A federal statute criminalizing the deprivation of a "right of honest services" cannot fairly be interpreted to authorize such a distorted role for state law in a federal prosecution; at the very least, a defendant charged with deprivation of an intangible "right" must be permitted to establish compliance with a relevant public definition of the

"rights" at issue. A contrary conclusion — as in this case — violates basic principles of fundamental fairness.[21]

3. The requirement of a state law violation, and of an opportunity to establish compliance with state law, is particularly important in this case. The context at issue — limits on political contributions and requirements of lobbyists — involves areas closely regulated by most states (including Maryland). They are freighted with weighty First Amendment concerns. *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (*per curiam*); U.S. Const. amend. I (right "to petition the Government for a redress of grievances"). The notion that this cryptic, twenty-seven word statute authorized federal prosecutors to impose their own notion of protected legal "rights" in this sensitive context — unmoored by the state's official, democratic resolution of these issues — is alarming, and unwarranted by the statutory language.

The role of state law in Section 1346 prosecutions presents a recurring and important question that warrants this Court's review.

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[21] Indeed, the confusion about the role of state law in this case is especially pronounced: (1) although the district court held that petitioner was precluded from introducing evidence of the meaning of state law (App., *infra*, 47a), the prosecutor, in closing argument, specifically argued that petitioner "was violating that law" (JA 1066; App, *infra*, 5a); (2) the only note from a juror during deliberations inquired about the ultimate destination of certain "cash money" — which the juror emphasized "may prove to be very important" and which was raised by the government's evidence regarding petitioner's supposed understanding of state law (*id.* at 1114); and (3) the court acknowledged after trial that "the jurors' attention was perhaps so diverted by the testimony, the evidence with regard to election law violations, that their findings of mail fraud [were] unduly influenced by that." *Id.* at 1109.

III. THIS COURT SHOULD REVIEW THE NECESSITY OF CONTEMPLATED HARM AND THE RELEVANCE OF VICTIM TESTIMONY IN MAIL FRAUD PROSECUTIONS.

This case also raises an important issue in mail fraud prosecutions: whether contemplation of harm is a necessary component of mail fraud, and whether the testimony of alleged victims is relevant to that determination.

The court of appeals acknowledged that "Circuits are split as to whether contemplated harm is necessary." App., *infra*, 9a. As the court explained (*id.* at 9a-10a), a number of Circuits have held that contemplated harm is necessary,[22] while other Circuits have held that contemplated harm is not necessary.[23] The court of appeals noted that, in contrast to the Second Circuit, it had "not held that contemplated harm is necessary in order to establish mail fraud," and that a district court decision (which it affirmed) concluded that contemplated harm was not necessary in the Fourth Circuit. *Id.* at 9a. Nonetheless, the court of appeals sought to evade the acknowledged conflict on this issue, which is critical to this case, by holding that victims' testimony of a lack of harm is "irrelevant" to contemplated harm. App., *infra*, 10a. This determination itself generates a conflict; other courts have emphasized the *relevance* (and importance) of victim testimony in determining whether a requisite contemplation

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[22] App., *infra*, 9a (citing *Cochran*, 109 F.3d at 668; *Jain*, 93 F.3d at 441; *United States v. D'Amato*, 39 F.3d 1249, 1255-57 (2d Cir. 1994); *United States v. Stouffer*, 986 F.2d 916, 922 (5th Cir.), *cert. denied*, 510 U.S. 837 (1993); *United States v. Utz*, 886 F.2d 1148, 1150 (9th Cir. 1989), *cert. denied*, 497 U.S. 1005 (1990)).

[23] App., *infra*, 9a-10a (quoting *Frost*, 125 F.3d at 354 and *United States v. Allard*, 926 F.2d 1237, 1242 (1st Cir. 1991)).

of harm was present. *United States v. D'Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994); App., *infra*, 11a (rejecting *D'Amato* with a "But see" citation).[24]

The court of appeals' invocation of other decisions to support its "irrelevan[ce]" holding, moreover, is unavailing. In fact, the court relied extensively on decisions involving the entirely distinct question (on which the circuits also are split) whether a scheme to defraud should be evaluated in light of the effect on "a person of ordinary prudence and comprehension" or on the "gullible or skeptical. App., *infra*, 10a.[25] To the extent that, as the court of appeals perceived, that issue bears on the "relevance" of victim testimony, that split itself merits review.

Both aspects of this issue — the necessity of contemplated harm and the relevance to that determination of victims' testimony — warrant this Court's review. Both recur with regularity in mail and wire fraud cases; both have received conflicting holdings from the courts of appeals; and, on both, the positions invoked to defeat petitioner's claim — that no contemplated harm is necessary, and that victims' testimony is irrelevant to the determination — are

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[24] Other decisions also have emphasized the *relevance* (and importance) of victims' testimony. *See United States v. Starr*, 816 F.2d 94, 96 (2d Cir. 1987) (reversing mail fraud convictions; alleged victims "testified at trial that they were satisfied with the service that they received"); *United States v. Regent Office Supply*, 421 F.2d 1174, 1182 (2d Cir. 1970) (reversing mail fraud convictions; "[n]o customer [*i.e.*, victim] testified that he felt he had been cheated."); *United States v. Goss*, 650 F.2d 1336, 1343 (5th Cir. Unit A 1981) (relying on victim's testimony concerning loss).

[25] *Compare United States v. Brien*, 617 F.2d 299, 311 (1st Cir.) (scheme covers "gullible or skeptical"), *cert. denied*, 446 U.S. 919 (1980) *and United States v. Maxwell*, 920 F.2d 1028, 1036 (D.C. Cir. 1990) *with United States v. Brown*, 79 F.3d 1550, 1557 (11th Cir. 1996) (rejecting *Brien* and *Maxwell*).

erroneous. Contemplated harm is critical to the threshold question whether there has been a "scheme to defraud." *D'Amato*, 39 F.3d at 1256-57. Victims' testimony that they were not harmed, moreover, must be at least "relevant" to that determination; if not, then basic principles of fairness dictate that victims' testimony likewise is not "relevant" (or even permissible) when the victims perceive harm.

This case presents these questions in a particularly compelling context. Not only did the alleged victims unanimously testify that they were not harmed, but, as the district court emphasized, the goal of serving, rather than harming, the alleged victims is readily apparent.[26] The issues of contemplated harm and the relevance of victims' testimony are undeniably important, and warrant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 20, 1999

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[26] JA 1297 (district court: "The fraud here was not perpetrated for direct monetary gain to the detriment of the clients involved. *The intent was clearly a mutual enhancement of the lobbying position of both the clients and the defendant*"; it involved "an arguable gain to the clients . . . as part and parcel of the total efforts that were put forth by [petitioner] on their behalf.") (emphasis added).

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BRUCE C. BEREANO, Defendant-Appellant.	)	No. 95-5312
UNITED STATES OF AMERICA, Plaintiff-Appellant, v. BRUCE C. BEREANO, Defendant-Appellee.	)	No. 95-5395

Appeals from the United States District Court
for the District of Maryland, at Baltimore.
William M. Nickerson, District Judge.
(CR-94-208-WN)

Argued: December 5, 1997

Decided: August 28, 1998

Before WILLIAMS, Circuit Judge, WILSON, Chief United States District Judge for the Western District of Virginia, sitting by designation, and MORGAN, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed in part and vacated and remanded as to sentencing by unpublished opinion. Judge Morgan write the majority opinion, in which Judge Williams joined. Chief Judge Wilson wrote an opinion concurring in part and dissenting in part.

COUNSEL

ARGUED: M. Albert Figinski, Stuart Ross Berger, WEINBERG & GREEN, L.L.C., Baltimore, Maryland, for Appellant. Dale Preston Kelberman, Assistant United States Attorney, Baltimore, Maryland, for Appellee. **ON BRIEF:** Lynne A. Battaglia, United States Attorney, Stephen S. Zimmerman, Assistant United States Attorney, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

MORGAN, District Judge:

On May 26, 1994, Bereano, an attorney and a registered Maryland lobbyist, was charged with eight counts of mail fraud. On November 30, 1994, the jury found Bereano

guilty on seven counts of mail fraud.[1] Four of Bereano's lobbying clients were billed $150.00 each for "legislative entertainment" in their September 1, 1990 bills; those amounts were found to actually represent reimbursements for unauthorized campaign contributions. Bereano appeals, arguing first that there was insufficient evidence to support a conviction of mail fraud under 18 U.S.C. § 1341 (1994), second that the indictment insufficiently pled violations of 18 U.S.C. § 1346 (1994), third that the trial court abused its discretion in permitting the Government to offer evidence of Maryland state election laws to prove the defendant's motive and intent, fourth that the trial court erred in denying defendant's motion for individualized voir dire, and finally that the trial court improperly allowed the Government to use a witness's grand jury testimony as evidence. The Government cross-appeals, arguing first that the trial court erred in refusing to enhance the defendant's sentence for "losses" incurred of more than $10,000 and second that the trial court erred in departing downward from the applicable sentencing guidelines range by two levels. For the reasons that follow, we affirm the judgment of the district court in part and vacate and remand as to sentencing.

I.

On May 26, 1994, the Grand Jury returned an eight count indictment charging Bereano with mail fraud under 18 U.S.C. §§ 1341 and 1346. The indictment was predicated on two theories, the knowing and willful scheme: (1) to defraud clients of money and property by submitting bills

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[1] Count 8 was dismissed pursuant to Bereano's motion for a judgment of acquittal.

which included false statements of expenses incurred and (2) to defraud clients of their right to Bereano's honest and loyal services. The indictment described a three-part scheme: (1) Bereano requested employees of the law firm of Bereano & Resnick and various family members to draw checks for political contributions which were distributed to candidates through Bereano's political action committee ("PAC"); (2) the employees and family members received reimbursements through checks from Bereano's law firm often with false notations concerning the check's true purpose; and (3) the reimbursements were pro-rated among Bereano's lobbying clients under the heading of "legislative entertainment." The retainer agreements between Bereano and his lobbying clients did not include authorization to make such contributions. The clients only agreed to pay Bereano a fixed retainer for his lobbying services and "reasonable and necessary expenses," such as photocopying, long distance phone calls, and "legislative entertainment," which Bereano defined as meals and entertainment, including sports events and concerts.

Prior to trial, several in limine motions were presented concerning which testimony would be admissible at trial. The use of Maryland state election laws was an issue included in the limine motions. The trial court determined that a violation of Maryland state election laws was both unnecessary and insufficient to prove mail fraud violations, thereby precluding the defendant from proving and arguing his compliance with same. However, in the course of trial, the court found that the state election laws could properly be admitted to show Bereano's intent and motive. Evidence concerning the Maryland election laws was admitted through two means. First, during its case in chief, the Government offered Exhibit 155 which was a letter written by Bereano to

one of his clients explaining the Maryland election laws as he understood them, and the letter had the relevant copies of the statutes attached. The letter with attachments was admitted into evidence. During Bereano's motion for judgment of acquittal, the Government argued that the letter was relevant to show what Bereano knew of the Maryland election laws. The trial court allowed the letter and the Maryland election statutes to be presented to the jury and instructed the jury that the laws were relevant to Bereano's motive and intent only.

Second, during closing remarks, the Government again made several references to the Maryland election laws. The prosecutor even stated that Bereano violated those laws. After the trial concluded with guilty verdicts, defense counsel again moved for a judgment of acquittal or, alternatively, for a new trial in response to these remarks. The trial court denied the motion, but stated that the amount of harm shown at the trial was "de minimis."

Another issue prior to trial concerned voir dire. Bereano requested extended and individual voir dire based upon allegedly adverse publicity targeted at Bereano's lobbying practices and at lobbyists generally. The trial court rejected Bereano's request. The procedure followed at trial involved three steps. First, the trial judge asked the entire jury pool general questions concerning media exposure and potential biases. Second, those responding affirmatively to general questions directed to the whole panel were questioned individually about potential biases against lobbyists and several individuals voiced negative opinions about lobbyists. However, none of those individuals with negative opinions were chosen for jury service. Third, after completing the individual questioning of selected veniremen, the trial judge

then repeated questions relative to lobbyists to the panel as a whole.

The grand jury testimony at issue was given by Sandra Steed O'Hearn, Bereano's bookkeeper and manual biller of lobbying clients. O'Hearn testified before the grand jury that Bereano instructed her to bill his lobbying clients for a pro-rated portion of various political contributions under the category of legislative expenses. At trial, O'Hearn denied that a policy, plan or scheme existed for falsely billing clients, and the prosecution impeached her by reading certain questions and answers from her grand jury testimony. O'Hearn testified that she did not remember such testimony before the grand jury. The grand jury transcript was never shown to O'Hearn, despite several requests by her and her attorney made prior to trial,[2] and the transcript was not entered into evidence at trial.

Other testimony at the trial included each alleged victim testifying that they perceived no fraud either in 1990 when they paid their fraudulent bills or at the time of the court proceedings.[3] However, the clients also testified that they never authorized Bereano to make political contributions nor did they agree to pay them. While O'Hearn testified that not all expenses entered into the computer were necessarily billed to clients, several of Bereano's employees testified to

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[2] The Government further asserts that defense counsel had a copy of O'Hearn's grand jury testimony. Bereano's motion in limine on this issue supports this contention in that defense counsel complains that the prosecution did not identify the pages he was reading from enabling defense counsel to "follow along and identify the accuracy of his quotation of the grand jury testimony."

[3] These same clients also testified at Bereano's sentencing hearing that they did not feel victimized.

writing checks to Bereano's PAC for which they were later reimbursed. However, none of these employees knew whether any lobbying client was billed for the political contributions made. Finally, there was documentary evidence admitted at trial including: (1) the two check stubs for reimbursements to O'Hearn with names of Bereano's clients listed on the stubs and "#110 per BCB," which is the billing code for legislative entertainment and Bereano's initials; (2) checks to Bereano's PAC by firm employees and family members and checks reimbursing those employees for contributions made; (3) computer generated cash flow reports marking various reimbursements and legislative entertainment expenses as "billed off;" (4) bills to clients noting legislative entertainment expenses with no corresponding explanation; and (5) letters written by Bereano to clients explaining his understanding of Maryland election laws and including copies of those laws.[4]

The jury found Bereano guilty of all seven counts of mail fraud. On April 21, 1995, the district court entered a judgment of conviction on all seven counts and sentenced Bereano to a five year term of probation with six months of that time to be served in community confinement, 500 hours of community service and a fine of $20,000. The sentence was imposed as to each of the seven counts of conviction, with all sentences to run concurrently. Further, a special assessment of $350 was imposed. However, the court granted Bereano a stay of the sentence pending appeal based upon its observation that this case "is a close case" with a "number of appellate issues" which warranted a stay.

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[4] The admission of this evidence is assigned as error by Bereano and the jury was instructed to consider it only as evidence of Bereano's motive and intent.

II.

In reviewing the sufficiency of the evidence, the appellate court "will sustain the jury's verdict 'if there is substantial evidence, taking the view most favorable to the Government, to support it.'" *United States v. Jackson*, 124 F.3d 607, 610 (4th Cir. 1997) (quoting *Glasser v. United States*, 315 U.S. 60, 80 (1942)). "Substantial evidence is evidence that a reasonable finder of fact would accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Id.*

In order to establish the crime of mail fraud, the Government must prove a scheme to defraud and the use of the mails in the execution of that scheme. *See Periera v. United States*, 347 U.S. 1, 8 (1954). In addition, the Government must establish that Bereano acted with the requisite intent to defraud. The scheme to defraud must be intended to deprive the victims of money or property, *see McNally v. United States*, 483 U.S. 350, 355 (1987), or their right to honest services. *See United States v. Bryan*, 58 F.3d 933, 942 (4th Cir. 1995); 18 U.S.C. § 1346 (1994). While the Government must prove an intent to defraud, it is not necessary for the Government to establish that the victim actually suffered a loss, only that Bereano intended such. *See United States v. Barber*, 668 F.2d 778, 784-85 (4th Cir.), *cert. denied*, 459 U.S. 829 (1982).

Bereano argues that this circuit should follow the lead of the Second Circuit and hold that more than a mere intent to deceive his clients is required. Instead, Bereano argues the Government must prove an actual intent to defraud and some type of contemplated harm which Bereano asserts does not exist in this case. *See United States v. Starr*, 816 F2d. 94, 98 (2d Cir. 1987); *United States v. Regent Office Supply Co.*,

421 F.2d 1174, 1182 (2d Cir. 1970); *United States v. D'Amato*, 39 F.3d 1249, 1256-57 (2d Cir. 1994). This Circuit has not held that contemplated harm is necessary in order to establish mail fraud. *See United States v. Butler*, 704 F. Supp. 1351, 1354 (E.D. Va. 1989) (noting that the view that a finding of "contemplated harm" is required was adopted by the Second Circuit only "and is in opposition to the rule in the majority of the Circuits. The Court does not agree that this situation represents so significant a split in the Circuits that the Fourth Circuit's eventual view is doubtful."), *aff'd*, 905 F.2d 1532 (4th Cir.), *cert. denied*, 498 U.S. 900 (1990). Other Circuits are split as to whether contemplated harm is necessary.[5] Yet, regardless of the

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[5] Some circuits have followed the Second Circuit's lead and required some contemplated harm to be present to establish intent to defraud. *See, e.g., United States v. Cochran*, 109 F.3d 660, 668 (10th Cir. 1997) ("We acknowledge that where actual harm exists as a natural and probable result of a scheme, fraudulent intent may be inferred. But we agree that in the absence of actual or potential harm, evidence independent of the alleged scheme must be adduced to show fraudulent intent towards the alleged victim." (citations omitted)); *United States v. Jain*, 93 F.3d 436, 441 (8th Cir. 1996) ("'the scheme to defraud need not have been successful or complete. Therefore, the victims of the scheme need not have been injured. However, the Government must show that some actual harm or injury was contemplated by the schemer.'" (emphasis in original) (quoting *D'Amato*, 39 F.3d at 1257)), *cert. denied*, --- U.S. ---, 117 S.Ct. 2452 (1997); *United States v. Stouffer*, 986 F.2d 916, 922 (5th Cir. 1993) ("The element of fraudulent intent, in turn, requires a showing that defendants contemplated or intended some harm to the property rights of their victims."); *United States v. St. Gelais*, 952 F.2d 90, 95 (5th Cir.) ("'Only a showing of intended harm will satisfy the element of fraudulent intent.'" (quoting *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987))), *cert. denied*, 506 U.S. 965 (1992); *United States v. Utz*, 886 F.2d 1148, 1150 (9th Cir. 1989) (requiring "an intent to obtain money or property from the victim of the deceit." (citations and internal quotation marks omitted)), *cert. denied*, 497 U.S. 1005 (1990).

Other Circuits have held that no contemplated harm must be shown. *See United States v. Frost*, 125 F.3d 346, 354 (6th Cir. 1997) ("A defendant does not commit mail fraud unless he possesses the specific intent to deceive or defraud . . .; "a scheme to defraud must involve [i]ntentional fraud, consisting in

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standard adopted, the Government argues and we agree that contemplated harm is present in this case. The contemplated harm is Bereano's fraudulent transfer to his clients of his cost of doing business which cost took the form of political contributions. The result would be the same if a different element of the cost of doing business was involved. For example, if he had apportioned his office rent among his clients under the heading of legislative entertainment, the contemplated harm element, if required, would have been satisfied. Therefore the evidence was sufficient to convict Bereano of § 1341 mail fraud violations.

Bereano relies on statements of the victims that no harm has occurred in arguing that no contemplated harm is present. Such issues are not decided at the whim of the perceived victim. The perception of the victim or target of the scheme is ultimately irrelevant to whether Bereano devised a scheme, or acted with the requisite intent to defraud. *See United States v. Brien*, 617 F.2d 299, 311 (1st Cir.) ("If a scheme to defraud has been or is intended to be devised, it makes no difference whether the persons the schemers intended to defraud are gullible or skeptical, dull or bright. These are criminal statutes, not tort concepts. The only issue is whether there is a plan, scheme or artifice intended to defraud."), *cert. denied*, 446 U.S. 919 (1980); *see also United States v. Maxwell*, 920 F.2d 1028, 1036 (D.C. Cir. 1990) (same); *United States v. Bryza*, 522 F.2d 414, 422

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deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed." (citations and internal quotation marks omitted)). Still others have merely defined the intent to defraud as "an intent to mislead the victim by inducing an uninformed consent to part with money or property." *United States v. Allard*, 926 F.2d 1237, 1242 (1st Cir. 1991) (citations omitted).

(7th Cir. 1975) (employee may be convicted of defrauding employer of "honest and faithful services" even if victim took no retributive action and was satisfied with defendant's performance. "[T]he defendant's intent must be judged by his actions, not the reaction of the mail fraud victims."), *cert. denied*, 426 U.S. 921 (1976). *But see D'Amato*, 39 F.3d at 1257 (holding that because alleged corporate victims had no complaints about Bereano's [*sic*] billing or about the services, perceived no fraud and felt no harm, the lawyer, by disguising the nature of his services on bills sent to his clients, merely deceived the clients as opposed to defrauding them).

Further, while his clients argue that they were satisfied with Bereano's services, they also testified that they did not authorize and would not have knowingly paid for the political contributions Bereano made. In support of this testimony, the client's retainer agreements only called for payment of Bereano's lobbying services and to reimburse him for "necessary and reasonable expenses," including "legislative entertainment." "Legislative entertainment" was defined as wining and dining legislators, providing tickets to sporting events, and the like. The retainer agreements do not authorize Bereano to make political contributions, nor did the clients authorize such expenses by any other means.

Sending a false bill to a third party through the mails with the necessary criminal intent is a classic violation of the mail fraud statute. *See United States v. Alexander*, 748 F.2d 185 (4th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985); *United States v. Perkal*, 530 F.2d 604 (4th Cir.), *cert. denied*, 429 U.S. 821 (1976). Accepting the reasonable inferences in favor of the Government, the totality of the evidence presented is sufficient to support a finding that Bereano had a specific intent to defraud, including contemplating harm to

his clients, thereby supporting his conviction on the seven mail fraud counts under § 1341.

III.

Federal Rule of Criminal Procedure 7(c)(1) requires that an indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." In order for the indictment to be sufficient, the Court of Appeals must not find that "the indictment as a whole is so vague that it violates defendants' rights." *United States v. American Waste Fibers Co., Inc.*, 809 F.2d 1044, 1046 (4th Cir. 1986). Whether an indictment properly charges an offense "is a matter of law which we may consider de novo if Bereano made a timely objection to the indictment." *United States v. Darby*, 37 F.3d 1059, 1062 (4th Cir. 1994), *cert. denied*, 514 U.S. 1097 (1995).

Bereano begins by challenging the sufficiency of the indictment. "[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974); *see also Darby*, 37 F.3d at 1063 ("An indictment must contain the elements of the offense charged, fairly inform a defendant of the charge, and enable Bereano to plead double jeopardy as a defense in a future prosecution for the same offense. . . . Moreover, the indictment must include every essential element of an offense, or else the indictment is invalid; and mere reference to the applicable statute does not cure the defect." (citations and internal quotation marks omitted)). Further, "[t]he indictment may incorporate the words of the statute to set forth the offense, but the statutory language 'must be

accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.'" *United States v. Yefsky*, 994 F.2d 885, 893 (1st Cir. 1993) (quoting *Hamling*, 418 U.S. at 117-18.)

First, Bereano argues that because he never held public office, "application of § 1346 to him overreached constitutional bounds." However, there is no indication that § 1346 only applies to public officials. Section 1346 of the same statute reads "For the purposes of this Chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

The plain language of the statute does not restrict its application to public officials. Further, § 1346 was a response by Congress to the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350 (1987). Prior to *McNally*, numerous circuit courts, including this Circuit, held that the mail fraud statute covered not only schemes to defraud others of property, but also schemes designed to defraud others of "intangible rights," including the public's right to honest government. *See McNally*, 483 U.S. at 356. In addition to the right to honest Government, pre-*McNally* cases held that the intangible rights covered included an employer's or other principal's right to the honest, faithful and disinterested services of its employees or agents, usually involving a breach of a fiduciary duty. Specific examples include cases where courts found a violation of the "honest and faithful services" right where an employee took kickbacks from third parties, embezzled company funds, owned a hidden interest in a firm with which his company did business, or traded in the securities market with inside information. *See, e.g., United States v. Dial*, 757 F.2d 163,

168-69 (7th Cir.), *cert. denied*, 474 U.S. 838 (1985); *United States v. Lemire*, 720 F.2d 1327, 1335-36 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984); *United States v. Seigel*, 717 F.2d 9, 14 (2d Cir. 1983); *United States v. Bohunus*, 628 F.2d 1167, 1174-75 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980); *United States v. McCracken*, 581 F.2d 719, 721-22 (8th Cir. 1978).

McNally attempted to limit the definition of "honest and faithful services," but this Circuit has held that Congress meant to return the definition to its pre-*McNally* scope through enacting § 1346. *See Bryan*, 58 F.3d at 942; *United States v. ReBrook*, 58 F.3d 961, 966-67 (4th Cir.), *cert. denied*, 516 U.S. 970 (1995). Thus, the "honest and faithful services" concept embodied in the statute covers not only circumstances where an agent defrauds his principal by stealing money from the principal, but also where an agent defrauds his principal of his "honest and faithful services" when he breaches his fiduciary duty and conceals material information from his principal, coupled with the necessary intent and use of the mails and wires. *See, e.g., United States v. Wallach*, 935 F.2d 445, 463 (2d Cir. 1991), *cert. denied*, 508 U.S. 939 (1993); *United States v. Ballard*, 663 F.2d 534, 541 (5th Cir. 1981); *United States v. Von Barta*, 635 F.2d 999, 1006 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981); *United States v. Bush*, 522 F.2d 641, 648 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976); *United States v. ReBrook*, 837 F. Supp. 162, 167-68 (S.D. W. Va. 1993), *aff'd in part and rev'd in part*, 58 F.3d 961 (4th Cir.), *cert. denied*, 516 U.S. 970 (1995). Therefore, § 1346 is not limited to public officials.

Second, Bereano focuses on the requirement that the breach must be material and that there must be an intent to defraud. *See, e.g., Cochran*, 109 F.3d at 667 ("[I]t would

give us great pause if a right to honest services is violated by every breach of contract or every misstatement made in the course of dealing. . . . [Therefore,] § 1346 must be read against a backdrop of the mail and wire statutes, thereby requiring fraudulent intent and a showing of materiality." (citations omitted)); *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 791 (1st Cir. 1990) ("However, not every use of the mails or wires in furtherance of an unlawful scheme to deprive another of property constitutes mail or wire fraud.... Nor does a breach of contract in itself constitute a scheme to defraud. . . . Rather, the scheme must be intended to deceive another, by means of false or fraudulent pretenses, representations, promises or other deceptive conduct. (citations omitted)), *cert. denied*, 498 U.S. 992 (1990); *Mandel*, 591 F.2d at 1363 ("Thus, the breach of fiduciary duty must be linked with some actionable fraud in order for the proscriptions of the mail fraud statute to apply."); *United States v. Venneri*, 736 F.2d 995, 997 (4th Cir. 1984) ("'Any breach of fiduciary duty by a corporate employee effected in part by the use of the mails may be a violation of the federal mail fraud statute, at least when accompanied by concealment or a failure to disclose relevant material information.'" (quoting *United States v. Shamy*, 656 F.2d 951, 957 (4th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982), *vacated on other grounds*, 886 F.2d 743 (4th Cir. 1984), *cert. denied*, 469 U.S. 1035 (1984))); *United States v. Feldman*, 711 F.2d 758, 763 (7th Cir. 1983) ("Yet not every breach of duty by an employee works as a criminal fraud, . . . and receipt of secret profits, standing alone, cannot support a mail fraud conviction. . . . . Such activities must be accompanied by a scheme formed with the intent to defraud. . . . . When an employee breaches a fiduciary duty to disclose information to his employer, that breach of duty can support a mail or wire fraud conviction only if the non-

disclosed information was material to the conduct of the employers business and the nondisclosure could or does result in harm to the employer." (citations omitted)); *United States v. Hess*, 591 F.2d 1347, 1363 (4th Cir. 1979) ("Thus, the breach of fiduciary duty must be linked with some actionable fraud in order for the proscription of the mail fraud statute to apply."). Such an argument is a challenge to the sufficiency of the evidence.

Reviewing the evidence in the light most favorable to the Government, there is a reasonable basis for finding that the issue of billing clients for unauthorized contributions to candidates was material. While Bereano's clients testified that they were indeed satisfied with Bereano's services, they also testified that they had not authorized contributions made to political candidates. Their understanding of the contents of "legislative entertainment" did not include these political contributions. Some clients further testified that the candidates to whom Bereano contributed were ones the clients specifically declined to support or were candidates opposed to ones the clients did support. However, it is not an element of the offense for the Government to prove that his clients would have likely contested the bills when they were first received had the clients known the true content of "legislative entertainment." The clients were billed for expenditures which they did not authorize and billed under a fraudulent category. This evidence is sufficient to uphold a finding of materiality.

To the extent that Bereano is claiming the indictment is too vague in its allegations of honest services, such issue was rejected by this Court in *United States v. Bryan*, 58 F.3d 933 (4th Cir. 1995). In *Bryan*, a public official argued that the indictment failed to allege an independent specific statute or regulation violated as part of the mail fraud scheme. *See*

id. at 940. Alternatively, Bryan argued that in the absence of such a statute or regulation, he had no way of knowing that his conduct would be deemed criminal. *See id.* at 941. The Court rejected this argument, holding that there was sufficient definition to the "deprivation of the intangible right of honest services" concept developed in the courts to put Bereano on notice. *See id.* at 941-42. The Court noted that "[t]o the extent that this amounts to an argument that § 1346 should be declared void for vagueness, we are unpersuaded." *Id.* at 941. Based on our prior decisions, the statute is not too vague to put Bereano on notice of the charges he faces.

As the trial court concluded, the indictment sufficiently alleges a scheme to defraud under § 1346. The indictment alleges that Bereano was an attorney and lobbyist who was retained by various clients to represent their interests. Indictment, ¶ 1, 3. As such, the indictment alleges he owed "a fiduciary duty to each of his lobbying clients to act honestly and faithfully for and on behalf of the clients." Indictment, ¶ 3. The indictment alleges that Bereano defrauded those clients of not only property, but his "honest and faithful services" as well. Indictment, ¶ 7(b). The indictment describes Bereano's scheme to defraud in that he submitted fraudulent bills to his clients, which misrepresented payments he made to reimburse others for nominee campaign contributions they made at Bereano's behest. Indictment, ¶ 8-16. Specifically, ¶ 16 alleges that Bereano "falsely represented to his lobbying clients on their periodic bills the expenses actually incurred on their behalf, by fraudulently including in those bills the amounts of the repayment checks used to reimburse the employees and family members for political contributions, which were falsely billed to clients as, among other things, legislative

entertainment." The indictment further describes how Bereano concealed this material information from his clients, such as concealing his identity as a contributor. Indictment, ¶ 18. Further, in response to Bereano's argument that somehow all the allegations in paragraphs 8-16 only describe the scheme to defraud under § 1341 described in ¶ 7(a), there is no delimitation as to what ¶ 8-16 refers. Paragraphs 8-16 follow the descriptions in both ¶ 7(a) referring to § 1341 and ¶ 7(b) referring to § 1346 or § 1341. There is no heading specifically describing ¶ 8-16 as acts only supporting § 1346. When the indictment is read as a whole, therefore, it is a "plain, concise and definite statement of the facts constituting the offense" as the indictment asserts Bereano's fiduciary duty and asserts that he falsely billed his clients. Therefore, the indictment contained the elements of the offense and met the requirement to fairly inform Bereano of the charges against him.

Further, even if the indictment lacked sufficient particularity as to § 1346, or there was insufficient evidence to uphold a conviction for mail fraud based on this section, the conviction will be affirmed when another sufficient basis for the conviction exists. *See Griffin v. United States*, 502 U.S. 46, 52-60 (1991); *United States v. McDonough*, 56 F.3d 381, 390 (2d Cir. 1995) (conviction under mail fraud indictment will stand if evidence indicates statute violated in either of two ways charged). In this case, there was sufficient evidence for conviction under § 1341.

IV.

A.

Bereano argues that the trial court erred in admitting evidence concerning Maryland election laws.[6] The trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. *See United States v. Heater*, 63 F.3d 311, 320 (4th Cir. 1995), *cert. denied*, 516 U.S. 1083 (1996).

This Circuit previously has concluded that a prosecution for mail fraud does not require the Government to establish proof of any violation of an underlying state law or regulation. *See Bryan*, 58 F.3d at 940. However, evidence of state election laws may be admissible to show knowledge and intent. *See United States v. Grubb*, 11 F.3d 426, 433 (4th Cir. 1993) (evidence of the judicial canon of ethics was admissible and relevant to prove intent and absence of mistake, when coupled with an appropriate limiting instruction); *United States v. Reamer*, 589 F.2d 769, 770 (4th Cir.) (evidence of state law and Code of Professional Responsibility admissible to prove intent in trial against attorney for mail fraud), *cert. denied*, 440 U.S. 980 (1978);

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[6] Bereano also argues that the Government implied that Bereano had committed perjury. Any implication by the Government in closing argument that Bereano had committed perjury by submitting false campaign contribution reports is reviewed for plain error as the first objection made concerning this issue was on appeal. *See United States v. Mitchell*, 1 F.3d 235, 242 (4th Cir. 1993); *St. Gelais*, 952 F.2d at 95. "To establish plain error, [a defendant] must establish that (1) the asserted defect in the trial was, in fact, error; (2) the error was plain; and (3) the error affected his substantial rights." *Jackson*, 124 F.3d at 614 (citing *United States v. Olano*, 507 U.S. 725, 732 (1993)). Any implication made was within the context of what Bereano's motive and intent were. Therefore, no plain error exists for admitting the evidence on this basis.

United States v. Morlang, 531 F.2d 183, 191-92 n.16 (4th Cir. 1975) (holding the standard of conduct of HUD employees in trial of HUD director admissible).

In response to objections made in this case to the prosecutor's closing arguments, the trial judge ruled the "[prosecutor] was very circumspect in the way he approached it and that he did not cross the line." All references to the state election laws were made within the context of Bereano sending the statutes to his clients, allegedly showing what his understanding of the law was. The statements by the prosecutor implying that Bereano was actually violating the law represented a minor portion of an extensive argument and were reported within a three-page span of the transcript of the closing argument which totalled forty pages. Finally, the trial judge, who was in the best position to weigh this issue, gave a limiting instruction that the Maryland election laws only went to prove Bereano's motive and intent. There is a presumption that a jury will follow a district court's limiting instruction. *See United States v. Powers*, 59 F.3d 1460, 1468 (4th Cir. 1995) (emphasizing that limiting instructions generally obviate any prejudice), *cert. denied*, 516 U.S. 1077 (1996); *United States v. Salva*, 745 F.2d 840, 844 (4th Cir. 1984) (same), *cert. denied*, 470 U.S. 1031, 105 S.Ct. 1404, 84 L.Ed.2d 791 (1985). The trial judge was correct in holding that the Maryland election laws were irrelevant in proving mail fraud violations. When the veil of the Maryland election laws is lifted from the evidence, it reveals a clearly visible scheme to fraudulently bill clients for unauthorized political contributions. Whether the election law evidence should have been admitted to show motive and intent presents a close question, but the evidence of mail fraud against Bereano is clear. Therefore, even if the trial court erred in

admitting the election law evidence, given its instructions to the jury, any possible error was harmless. Bereano's understanding of the election laws arguably explains his motive and intent for choosing the particular scheme which he utilized. Further, Bereano asserted a defense of good faith. This evidence may be probative of bad motive or intent as opposed to good faith.

B.

In reviewing a claim of prosecutorial misconduct, the Court reviews the claim to determine whether the conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *United States v. Morsley*, 64 F.3d 907, 913 (4th Cir. 1995) (citations and internal quotation marks omitted), *cert. denied sub nom., McKoy v. United States*, 516 U.S. 1065 (1996). This Circuit has held "'that the test for reversible prosecutorial misconduct generally has two components: that (1) the prosecutor's remarks or conduct must in fact have been improper and (2) such remarks or conduct must have prejudicially affected Bereano's substantial rights so as to deprive the defendant of a fair trial.'" *United States v. Mitchell*, 1 F.3d 235, 240 (4th Cir. 1993) (quoting *United States v. Brockingham*, 849 F.2d 872, 875 (4th Cir. 1988)) (quoted in *United States v. Chorman*, 910 F.2d 102, 113 (4th Cir. 1990)); *Morsley*, 64 F.3d at 913. This Court has noted a number of factors in evaluating the issue of prejudice to Bereano, namely "'(1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.'" *Mitchell*, 1

F.3d at 241 (citing *United States v. Harrison*, 716 F.2d 1050, 1052 (4th Cir. 1983) (quoted in *Chorman*, 910 F.2d at 113)), *cert. denied*, 466 U.S. 972 (1984); *Morsley*, 64 F.3d at 913.

"It is often said and often forgotten that the duty of a prosecuting attorney is not to convict defendants but to try them fairly. Absolute fairness is a counsel of perfection. But the prosecutor should hold himself to the highest practicable standard of fairness." *McFarland v. United States*, 150 F.2d 593, 594 (D.C. Cir. 1945). Bereano argues that prosecutorial misconduct occurred in that the prosecution first argued that the state election laws were immaterial to mail fraud, but then relied upon the same state election laws in opposing his motion for judgment of acquittal and in arguing that Bereano was guilty during closing arguments. Bereano asserts that this is prosecutorial overreaching and that "such references were a culmination of a string of errors which permeated the trial."

Prosecutorial misconduct warrants the reversal of a conviction only in rare and egregious cases. For example, a conviction was overturned when the prosecution prejudiced the appellant's substantial rights by repeatedly referring to a conviction of another participant in the same conspiracy and the appellant's relationship to that co-conspirator. *See Mitchell*, 1 F.3d at 241-44. The Court based its conclusion on such factors as calling into question evidence not before the jury, the prosecution's case could withstand a sufficiency of evidence challenge but was not overwhelming, the prosecution deliberately made improper comments before the jury in order to divert the jury's attention, and the district court failed to give a limiting instruction to the jury. *See id.* at 241-42. In contrast, no reversible error was found when the prosecution told the jury that Bereano [*sic*] used different names and inferred that Bereano [*sic*] had been charged with

murder and rape previously, neither of which were true; the prosecution said in opening statements that even a condemned man gets a last meal while the victim did not; and the victim's bloodstained underclothes were kept conspicuously displayed for several hours. *See McFarland*, 150 F.2d at 593-94.[7] When evaluating the factors identified

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[7] More recent examples of circumstances not warranting reversal include: *United States v. Burns*, 104 F.3d 529, 537 (2d Cir. 1996) (holding that prosecution's applauding after defense counsel's summation was not prosecutorial misconduct because there were curative instructions given and sufficient evidence to convict without the misconduct); *United States v. Collins*, 78 F.3d 1021, 1039-40 (6th Cir. 1996) (holding instances of laughter, gestures and facial expressions by prosecutor may have been improper, but fell far short of reversible error), *cert. denied*, --- U.S. ---, 117 S.Ct. 189 (1996); *Mills v. Singletary*, 63 F.3d 999, 1013-14 (11th Cir. 1995) (holding prosecutor's pretrial solicitation of comments about potential jurors from county sheriff, deputy sheriff, bailiff, clerk of court and victim's father was not prosecutorial misconduct because the conduct was not brought to the attention of anyone on venire list), *cert. denied*, 517 U.S. 1214 (1996); *United States v. Wiley*, 29 F.3d 345, 351-52 (8th Cir.) (characterization of defendant as a "criminal" and "drug dealer" did not deprive defendant of a fair trial), *cert. denied*, 513 U.S. 1005 (1994); *United States v. Chambers*, 944 F.2d 1253, 1272 (6th Cir. 1991) (holding no prosecutorial misconduct occurred when prosecution drew picture of courtroom indicating where drug defendant was sitting and nodded and winked to government witness during her testimony), *cert. denied*, 502 U.S. 1112 (1992); *Grochulski v. Henderson*, 637 F.2d 50, 53-54 (2d Cir.) (holding that although prosecutor visited homes of various alibi witnesses in order to obtain statements about their forthcoming testimony, visits were limited to minimum necessary and occurred only because defendant had notified prosecution of its intent to put witnesses on stand at a time later than that fixed by New York statute governing adversary notice of alibi witnesses, and therefore, there was no evidence of prosecutorial misconduct, despite claim that prosecutor intimidated witnesses), *cert. denied*, 450 U.S. 927 (1981); *United States v. Bashaw*, 509 F.2d 1204, 1205 (9th Cir. 1975) (holding prosecutor's comment during summation "that the defendant's evidence doesn't meet its burden of showing the defendant did not commit the crime charged" was improper, but was legally harmless, where district judge immediately instructed jury that it must not accept the statements of counsel as to the law, jury was carefully instructed that it rested upon the prosecution to prove defendant's guilt beyond a reasonable doubt, and evidence of defendant's guilt was overwhelming). *But see Drake v. Kemp*, 762 F.2d 1449, 1458-60 (11th Cir. 1985) (holding prosecutor's closing argument in

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by this Circuit in answering this question, we must first determine "the degree to which the prosecutor's remarks have a tendency to mislead the jury and prejudice the accused. . . ." *Mitchell*, 1 F.3d at 241. First, this argument was made in the context of Bereano's knowledge of the law as it tended to prove whether he had acted in good faith which is a proper purpose as noted by the trial court. Also relevant to this inquiry is whether the trial court gave a limiting instruction concerning that evidence. Unlike *Mitchell*, the judge did give a limiting instruction to the jury in this case telling them that the information concerned what Bereano knew about the election laws and what his intent was. The trial judge also redacted reference to the election laws from the indictment before it was made available to the jury. Given this limiting instruction and the redaction, the comments were not prejudicial, they did not mislead the jury and they did not prejudice the accused. Therefore, this factor weighs in favor of the Government.

Second, we must determine whether the remarks were pronounced and persistent. While several allegedly inappropriate remarks were made by the prosecution, they were made within the context of what Bereano knew the law to be, which went to motive, intent, and lack of good faith. Further, the comments were few in comparison to forty pages of transcript covering the Government's closing

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sentencing phase of capital murder prosecution, in which prosecutor cited two state Supreme Court decisions which were over 100 years old to urge jury not to consider mercy in imposing sentence, was misleading and prejudicial; as evidence implicating defendant in murder was not overwhelming, improper argument rendered sentencing hearing fundamentally unfair), *cert. denied*, 478 U.S. 1020 (1986).

argument. Finally, the trial judge recognized the issue and ruled that the prosecution's statements were proper. Therefore, this factor also weighs in favor of the Government.

Third, as for the amount of properly admitted evidence available against Bereano, the trial court described the evidence as "thin" and obscure." However, when the election law issue is put aside, the remaining evidence of fraud is clear. The alleged victims of the fraud all testified to the fact that they believe they received the full benefit of Bereano's services. However, they all testified that they did not authorize, by contract or otherwise, political contributions being charged to them. Had such victims not authorized the wining and dining of legislators, the billing of same to clients under the heading of, for example, legal research would be similarly fraudulent. Therefore, this factor also weighs somewhat in favor of the Government.

Fourth, we must assess "whether the comments were deliberately placed before the jury to divert attention to extraneous matters." *Mitchell*, 1 F.3d at 241. The knowing violation of Maryland state election laws arguably was evidence showing a lack of good faith by Bereano."[8]

The totality of the *Mitchell* factors weigh in favor of the Government, albeit some factors more than others. Accordingly the Government's argument did not "so infect the trial with unfairness as to make the resulting conviction a

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[8] The Government made that argument in its closing statement, stating: "In deciding whether Mr. Bereano acted in good faith honestly, or whether he acted with the intent to deceive, you are entitled to consider whether he believed he was violating the state's election laws. . . ."

denial of due process." *Morsley*, 64 F.3d at 913 (citations and internal quotation marks omitted).

C.

An indictment may not be "'amended except by resubmission to the grand jury.'" *United States v. Leichtman*, 948 F.2d 370, 376 (7th Cir. 1991) (quoting *Russell v. United States*, 369 U.S. 749, 770 (1962)); *see also Stirone v. United States*, 361 U.S. 212, 215-16 (1959). If an amendment occurs, the conviction "is reversible per se." *Id.* However, an amendment to an indictment is not fatal in two circumstances. First, there is no amendment when the change is "merely a matter of form," such as a correction for a typographical or clerical error or a misnomer, a formal change to the date specified in the indictment within limits, or an inconsistency amounting to a simple matter of semantics. *Id.* Second, an indictment is not amended if "all that has happened is that the evidence or the charges submitted to the trial jury wind up being simply a more limited version of the charges in the indictment. An indictment may be narrowed, either constructively or in fact, without resubmitting it to the grand jury." *Id.*

Bereano claims there was an impermissible amendment of the indictment. A change to the indictment is an impermissible amendment if the change broadens the charges presented to the jury allowing them to consider more or different offenses than the grand jury charged. For example, if the indictment charges a RICO conspiracy among individuals "associated with an enterprise, to wit . . . the DeCavalcante Family of La Cosa Nostra," but the jury is only instructed that the defendants are associated with "an enterprise," then an amendment has occurred. *See Leichtman*, 948 F.2d at 377-78. "[T]he more general

instruction would allow the defendants to be convicted of an enterprise other than the one charged in the indictment, violating [the defendant's] right to be tried only on the charges approved by the grand jury. . . ." *Id.* at 377.

In this case, Bereano was charged with eight counts of mail fraud. References to the Maryland state election laws were redacted in two places: first, in ¶ 6, the indictment recited the provisions of Md. Code Ann. Art. 33, §§ 26-29,[9] and second, in ¶ 18(2), the indictment recited that an outcome of the previously described scheme was to allow Bereano to "(2) make political contributions in excess of the limitations imposed by Maryland election law."[10] Neither reference to the Maryland state election laws is contained within the section labeled "The Scheme and Artifice to Defraud." When redactions are made to portions of the indictment not contained within the description of the scheme, no constructive amendment has occurred. *See*

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[9] Paragraph 6 of the indictment reads:

At all relevant times material to the Indictment, the Annotated Code of Maryland, Article 33, section 26-29 prohibited any individual or corporate entity from contributing in excess of $1,000 to any one candidate or in excess of a total of $2,500 to any group of candidates in any primary or general election for public office in the state of Maryland and prohibited any individual or corporate entity from contributing in excess of $2,500 to any Maryland state political action committee in any primary or general election.

[10] Paragraph 18 reads in full:

By means of the foregoing scheme and artifice, BRUCE C. BEREANO was able to: (1) conceal the true identities of the actual contributors of campaign funds; (2) make political contributions in excess of the limitations imposed by Maryland state election law; (3) cause candidates to file false campaign finance reports, thereby concealing the true identity of the contributor to the candidate's campaign; (4) cause his own lobbying activity reports to be false; and (5) defraud his lobbying clients of approximately $16,000 to reimburse BRUCE C. BEREANO for said political contributions.

United States v. Schnabel, 939 F.2d 197, 203 (4th Cir. 1991) ("'[T]he contested language is in a predicate paragraph and therefore is not an element of the offense charged. 'In determining whether there has been a variance between pleading and proof, it is the charging paragraphs that are to be examined.'" (quoting *United States v. Jordan*, 626 F.2d 928, 931 (D.C. Cir. 1980)). Further, the jury was instructed that violations of the state election laws could only be considered on motive and intent, the converse of Bereano's alleged good faith defense. *See Bryan*, 58 F.3d at 941-42 (holding mail fraud conviction does not require the government to establish proof of any violation of an underlying state law). Therefore, the redaction of the indictment was not prejudicial to Bereano.

V.

"A trial court has wide latitude in conducting voir dire. The court abuses its discretion only 'where the court's restriction hinders a defendant's opportunity to make reasonable use of his challenges.'" *United States v. Muldoon*, 931 F.2d 282, 286 (4th Cir. 1991) (quoting *King v. Jones*, 824 F.2d 324, 326 (4th Cir. 1987)); *see also Ham v. South Carolina*, 409 U.S. 524, 527-28 (1973); *United States v. Bakker*, 925 F.2d 728, 733 (4th Cir. 1991) ("A trial court has broad discretion to control the scope of questions during voir dire." (citations omitted)). Therefore, the standard of review for the trial court's questions in voir dire is one of harmless error, *see Muldoon*, 931 F.2d at 286, and the standard for the conduct of voir dire generally is an abuse of discretion. *See Bakker*, 925 F.2d at 733.

"It is well settled that a trial judge may conduct voir dire without allowing counsel to pose questions directly to the potential jurors" as well as "question prospective jurors

collectively rather than individually." *Bakker*, 925 F.2d at 734 (citing Fed. R. Crim. P. 24 (a)); *see also Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991); *Wells v. Murray*, 831 F.2d 468, 472-74 (4th Cir. 1987) (individual voir dire not required in spite of public castigation of jurors for lenience in prior case). Individual questioning is especially unnecessary when the trial court "provides for individual questioning of a juror whose initial responses prove less than satisfactory and offers potential jurors the opportunity to speak with the court privately." *Bakker*, 925 F2d at 734. Lastly, "'it is not required . . . that jurors be totally ignorant of the facts and issues involved [in the case]. . . . It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.'" *Id.* at 734 (citing *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961)).

Bereano requested extended and individual voir dire predicated on numerous newspaper articles that depicted Bereano as "the merchant of death" and "evil incarnate." The trial court denied this request. Instead, the trial judge began by asking questions to elicit whether the jurors knew of the case through media coverage. As to those members of the venire who responded to the collective voir dire, the judge questioned veniremen individually during bench conferences and allowed the attorneys to do the same. Also at those bench conferences, the judge elicited biases the jurors might have against lobbyists, and some individuals were excused on such grounds. The trial judge then asked questions to the entire venire panel to elicit any prejudices against lobbyists that may exist. The judge questioned the jurors about several aspects of political life including

lobbyists, political campaigns, and PACs.[11] No juror responded to the judge's inquiries. The voir dire of the jurors lasted two days. While the length of questioning is not relevant to the determination of whether voir dire was proper, *see Bakker*, 925 F.2d at 733, it is an indication of the thoroughness of the trial judge in inviting the jurors to communicate any potential problems they might have had.

The process used by the trial judge was identical to the process used in *United States v. ReBrook*, 58 F.3d 961, 969 (4th Cir.), *cert. denied*, --- U.S. ---, 116 S.Ct. 431 (1995) and *United States v. Bakker*, 925 F.2d 728, 733 (4th Cir. 1991). In *ReBrook*, the defendant was concerned with prejudicial pretrial publicity. *Id.* The trial court questioned the potential jurors generally about pretrial publicity, their knowledge of the defendants and related matter. *Id.* The court individually questioned potential jurors whose responses suggested prejudice. *Id.* This Circuit found that

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[11] The trial judge presented the following two questions: "The first question is whether you hold any particular opinion or opinions about lobbyists or the practice of lobbying elected officials that might affect your ability to render a fair and impartial verdict in this case? And along with that, although it is not necessarily tied to it, is the question as to whether you hold any opinion or opinions about Political Action Committees, or the making of political contributions again that might affect your ability to be fair and impartial with respect to a verdict in this case. If anybody has any such opinions, come on up here and express them at the bench."

There was no response to this question. The court then further inquired, asking "Is there anybody here who has any business or any social relationships with any lobbyists?" When a juror responded, the judge asked what the association was and whether the association would make the juror partial, to which the juror answered "Not at all, Your Honor." The judge then followed those questions with questions concerning whether any juror ran for political office or was an officer or actively involved in a campaign or political organization. There were no responses to these questions.

the process was effective in insuring a fair and impartial jury. *Id.* In *Bakker*, this Circuit held the denial of individual voir dire was proper when the court "provided for individual questioning of a juror whose initial responses prove less than satisfactory and offers potential jurors the opportunity to speak with the court privately." 925 F.2d at 734. Based upon this precedent and the circumstances of this case, no abuse of discretion occurred with respect to voir dire.

VI.

Bereano assigns error because the transcript of the grand jury testimony used to impeach O'Hearn was not admitted into evidence and the prosecution relied on the grand jury testimony in its closing arguments. Bereano first raised his objection in his motion in limine directly preceding the Government's closing argument. When a defendant objects to the manner in which evidence is presented, the issue is reviewed under the "harmless error" standard. *See* Fed. R. Crim. P. 52(a). Under Rule 52(a), "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Because Bereano objected to the use of the grand jury testimony prior to its use in closing arguments, error which may have occurred through the use of the grand jury testimony in closing arguments, if any, is reviewed for harmless error.

Federal Rule of Evidence 613 provides that:

> *(a) Examining witness concerning prior statement.* In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

> *(b) Extrinsic evidence of prior inconsistent statement of witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

In arguing this assignment of error, Bereano analogizes to cases involving oral statements that hold that "it is reversible error [for the Government] to fail to produce the person to whom the statement was purportedly made to contradict the witness." *United States v. Bohle*, 445 F.2d 54, 73 (7th Cir. 1971); *see also United States v. Harris*, 542 F.2d 1283, 1307 (7th Cir. 1976). However, there is a clear difference between using prior inconsistent oral statements and transcribed prior inconsistent statements under oath. Therefore, there is a distinction between cases governing oral statements and the present situation.

The transcribed grand jury testimony could have been admitted into evidence if defense counsel had objected at the time O'Hearn testified. However, this omission was not error. First, Bereano had an opportunity to clarify the grand jury testimony. Further, the Government had a copy of the statement available if the defense had requested a copy. *See United States v. McCall*, 85 F.3d 1193, 1197 (6th Cir. 1996) (noting it is proper for the Government to present the prior inconsistent statements during cross-examination); *United States v. Hudson*, 970 F.2d 948, 955 (1st Cir. 1992) (holding Rule 613 does not "require that the witness be confronted with the statement while on the witness stand, but rather, only that the witness be available to be recalled in order to explain the statement during the course of the trial.") (citations omitted). However, no request for a copy was

made. Likewise, instead of objecting to the failure of the Government to admit the grand jury transcript while O'Hearn was testifying, the defense remained silent concerning the incident until after both parties had rested. The issue was raised for the first time directly before the Government's closing argument. Bereano gave the court no opportunity to correct any allegedly improper admission of evidence.

Second, the Government correctly followed the procedure laid out in Federal Rule of Evidence 613 that deals with prior statements. It properly laid a foundation for the statement. On cross-examination, O'Hearn was asked and denied that there was any practice or policy at the firm to bill the clients fraudulently. On redirect, O'Hearn claimed she could not recall whether Bereano instructed her to bill political contributions as reimbursement expenses. The Government then read questions and answers from her grand jury testimony in which she testified that Bereano gave her instructions regarding how to bill clients for these political contributions. When asked if she remembered giving these answers to the grand jury, O'Hearn testified that she could not remember. O'Hearn's lack of memory concerning her prior inconsistent statements can be construed as either a denial or an admission of her prior statements. Therefore, use of the grand jury testimony was proper impeachment evidence[12] and the Government relied upon it in its closing

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[12] This Circuit also permits grand jury testimony to be used as substantive evidence under Federal Rules of Evidence 801(d)(1)(A) or 803(24). Grand jury testimony can be used as substantive evidence under Federal Rules of Evidence 801(d)(1)(A) if declarant is subject to cross-examination at trial. *See United States v. Stockton*, 788 F.2d 210, 219 n.14 (4th Cir. 1986) ("Simmons' prior testimony before the grand jury would be hearsay, were it not for Fed. R. Evid. 801(d)(1)(A), which exempts from the definition of hearsay prior inconsistent

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argument as such. The Government recounted O'Hearn's earlier testimony that Bereano never directed her to bill expenses as legislative entertainment. The Government then read her earlier grand jury testimony which directly contradicted her trial testimony and emphasized that "somehow, somehow Sandra Steed O'Hearn could not remember that" and that "she had forgefulitis." The Government concluded by arguing that O'Hearn was either lying before the grand jury or at trial and that the jury could infer that "[s]he was lying to protect Bruce Bereano." Accordingly, the Government's reference to O'Hearn's grand jury testimony was proper impeachment evidence and no error occurred.

VII.

The Government objects to the trial court's determination that there was only $600 of "loss" to these victims as that term is defined under the Sentencing Guidelines. We review de novo the district court's legal interpretation of the term "loss" under the Sentencing Guidelines as well as the factors

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statements made by a witness at trial, if those statements were made 'under oath subject to the penalty of perjury at a trial, hearing, or other proceeding.' Testimony before grand jury falls within the scope of the rule."); *United States v. Grandison*, 780 F.2d 425, 431 (4th Cir. 1985) (holding grand jury testimony admissible to protect against "turncoat" witness), *cert. denied*, 459 U.S. 934 (1990); *United States v. DiCaro*, 772 F.2d 1314, 1321 (7th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986); *United States v. Murphy*, 696 F.2d 282, 284 (4th Cir. 1982) (holding grand jury testimony is admissible under Rule 801(d)(1) if declarant testifies at trial and is cross-examined and if the grand jury testimony was given under oath), *cert. denied*, 461 U.S. 945 (1983). However, this Court holds that the grand jury testimony was properly relied upon only as impeachment evidence, and there is sufficient evidence to support Bereano's conviction without considering O'Hearn's grand jury testimony as substantive evidence.

the court considers. *See United States v. Castner*, 50 F.3d 1267, 1274 (4th Cir. 1995); *United States v. Reddeck*, 22 F.3d 1504, 1511 (4th Cir. 1994); *United States v. Chatterji*, 46 F.3d 1336, 1340 (4th Cir. 1995). However, "'to the extent that the determination of the amount of loss is a factual matter, we review only for clear error.'" *Castner*, 50 F.3d at 1274 (quoting *United States v. West*, 2 F.3d 66, 71 (4th Cir. 1993)).

Loss is defined as the "value of the money, property, or services unlawfully taken." U.S. Sentencing Guidelines Manual § 2F1.1, comment. (n.7) (1995). The Guidelines further provide that "the loss need not be determined with precision. The court need only make a reasonable estimate if the loss. . . ." USSG § 2F1.1, comment. (n.8). However, "[t]he cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction." USSG § 2F1.1, comment. (n.6).

The trial court noted several reasons to support its holding that no enhancement for loss sustained was warranted. These reasons, noted as follows, were improperly considered in determining whether a loss enhancement is warranted: (1) the clients may have benefitted from the fraud,[13] (2) the

[13] *See Castner*, 50 F.3d at 1276 (notwithstanding the alleged benefit to clients, "the payment fraudulently obtained in excess of the amount to which a defendant is legally entitled . . . is [the] measure of the amount of loss for sentencing purposes" and the argument that loss occurred because parts were received faster and cheaper was irrelevant); *United States v. Rothberg*, 954 F.2d 217, 219 (4th Cir. 1992) (reversing the trial court's decision that because the bank could benefit in the future by collecting on the existing collateral underlying a false loan application, the amount of loss was too speculative).

assertion that Bereano received little benefit,[14] and (3) the clients' desire that Bereano should be dealt with leniently.[15]

In addition, the trial court found that the Government failed to establish that $16,000 of loss was sustained as opposed to $600. When requesting a sentencing enhancement, the Government bears the burden of proving, by a preponderance of the evidence, the victim's losses. *See Reddeck*, 22 F.3d at 1512. In support of that determination, we agree that the Government's factual evidence failed in several ways. First, many of the check stubs and other documents showing that the clients had been falsely billed were not presented to the sentencing court. Even if they had been, the total amount of all the check stubs submitted at trial was $1300 and only two of these stubs, totaling $600, clearly showed that the reimbursements paid would be billed to the clients as "legislative entertainment." Second, many of the documents showing which clients were billed for which portions of the political contributions were destroyed.[16] The bills do not note justifications for the

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[14] *See United States v. Campbell*, 42 F.3d 1199, 1205 (9th Cir. 1994) ("We do not subtract the costs of pulling off the caper when we calculate the value of the stolen property."), *cert. denied*, 514 U.S. 1091 (1995); *United States v. Schweizer*, 5 F.3d 44, 47 (3d Cir. 1993) (refusing to deduct the amount of the bribe paid in calculating benefit under the guidelines).

[15] *See Reddeck*, 22 F.3d at 1512 (holding the sentencing guidelines do not provide for "an abstract factoring of a victim's residual and subjective 'satisfaction.' Calculation of lost value requires an objective standard, usually measured by the 'fair market value.'" (*citing* USSG § 2B1.1, comment. (n. 2)).

[16] After inquiries were made by a legislator concerning one of Bereano's contributions, many of O'Hearn's notes designating which clients were billed for which contributions were destroyed for some fear of discovery. The few notes that survived became the basis for these mail fraud allegations. The Government asserts that other allegations of overbilling, i.e., that a total of $16,000 worth of overbilling occurred, were not criminally pursued because, though the

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various "legislative entertainment" expenses, but there was no connection proven between specific contributions and specific "legislative entertainment" charges beyond the two specific check stubs totaling $600. Finally, there was evidence of computer printouts noting that political contributions were "billed off," implying that clients were billed improperly for these expenses, but there was testimony alleging that not all items marked billed off in the computer meant that clients were billed for those expenses. Based upon the insufficiency of the Government's evidence, the trial court's refusal to enhance Bereano's sentence based on losses over $10,000 is affirmed.

VIII.

The Government also noted its objection to the trial court's reasoning for downwardly departing. Previously, this Court applied a multi-part analysis which involved:

> (1) a *de novo* standard [of review] to determine whether the reasons the district court used to support its departure encompassed a factor not adequately taken into consideration by the Sentencing Commission in formulating the guidelines, (2) a clearly erroneous standard to review whether the district court had adequate factual support to depart on the basis of the factor, (3) an abuse of discretion standard to determine whether the

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Government had evidence in the form of check stubs and client bills that overbilling had occurred, the destruction of the notes in regard to those transactions made the specifics of who was overbilled on which occasions most difficult to prove beyond a reasonable doubt. As noted above, only two check stubs clearly showed that clients were billed for political reimbursements and those two stubs totaled only $600.

> factor is of sufficient importance to justify a sentence outside the guideline range, and (4) an abuse of discretion standard to review whether the extent of the departure was reasonable.

United States v. Hairston, 96 F.3d 102, 106 (4th Cir. 1996) (citations and internal quotations omitted). However, *Koon v. United States*, --- U.S. ---, 116 S.Ct. 2035, 2048 (1996), abolished the "de novo" review under the above multi-layered test and substituted a "unitary abuse of discretion standard." This "unitary abuse of discretion standard" includes:

> a legal analysis as to whether the Commission listed certain factors as forbidden, discouraged or encouraged departure bases. We do not accord a district court's legal conclusions on these questions any particular deference. However, we do defer to a sentencing court's fact-based determination as to whether the presence of a suggested feature removed a case from the "heartland" for which the guideline was designed. Because "[a] district court by definition abuses its discretion when it makes an error of law," our overall review is thus for abuse of discretion.

Hairston, 96 F.3d at 106-07 (citing *Koon*, --- U.S. at ---, 116 S.Ct. at 2048); *see also United States v. Rybicki*, 96 F.3d 754, 757 (4th Cir. 1996); *United States v. Brock*, 108 F.3d 31, 33 (4th Cir. 1997) ("The [*Koon*] Court explained that when assessing whether a potential basis for departure was adequately considered by the Commission in formulating the guidelines, the correct inquiry necessarily focuses on whether the factor is addressed by the guidelines, policy statements, or official commentary and whether it is encompassed within the heartland of situations to which the

guidelines were intended to apply." (citing *Koon*, --- U.S. at ---, 116 S.Ct. at 2044-45)).

The reasons given by the trial court justifying the downward departure in essence are two-fold: (1) Bereano did not profit from his crime; and (2) the victims do not feel defrauded. Using the above standard of review, we must review the use of these factors for any legal errors constituting an abuse of discretion.

Defendant's first argument is akin to this court's reasoning in *United States v. Seacott*, 15 F.3d 1380 (4th Cir. 1994). In that case, the district court reasoned that the Guidelines did not take into account the possibility that a defendant would be motivated by reasons other than his own personal gain in the context of misapplying funds in violation of 18 U.S.C. § 657 (1994). *See id.* at 1387. We held that such reasoning was a "legally insufficient reason to depart from the applicable Guidelines range." *Id.* There, as here, a departure based on the belief that a crime was committed "without concern for [a defendant's] own economic self-interest" is clear error. *Id.* The Guidelines consider both harm to the victim and gain to the defendant, and therefore, a lack of profit motive reason used to depart is in direct contravention to the Guidelines. *See id.* "The same amount has been taken from the victim no matter what the fate of the funds. The aim of the criminal law in this area is to deter misapplication of funds for any reason." *Id.* Therefore, reliance on this factor is legal error.[17] As to the

[17] It is difficult to accept the proposition that Bereano did not benefit, as the amount of political contributions was a part of the "overhead" of his lobbying practice. The result would be the same if he billed his clients for office rent or car payments under the heading of "legislative entertainment."

perceptions of the victims, the Guidelines contain several provisions for adjustments to a sentence based on the effect of the crime on a victim. *See, e.g.*, USSG §§ 5K2.1, 5K2.2, 5K2.3, 5K2.4, 5K2.8, and 5K2.10. None of these provisions, however, justify a departure when the victim allegedly does not perceive being wronged. The Sentencing Commission considered enhancement for aggravating circumstances, and downward departures for lesser harms. Further, the trial court considered the victims' perceptions when deciding not to enhance the loss calculation. Since we have found that this factor should not be considered in enhancing the loss calculation, double counting is no longer an issue. However, we find that the use of that factor as a basis for granting a downward departure is also impermissible. *See United States v. Ellen*, 961 F.2d 462, 468 (4th Cir.), *cert. denied*, 506 U.S. 875 (1992). The trial court relied upon this factor when it stated

> I am limiting the [downward] departure to only two-levels, because I find some merit to the concerns that have been expressed by the Government. One [concern] as Mr. Kelberman put it [is] we are riding the same horse to some extent by reason of the fact that no loss enhancement was applied [due to the victims' statement that they did not feel defrauded.]

In light of the *Koon* decision, which this Court notes post-dated the trial court's ruling, the trial court relied upon impermissible reasons for granting a downward departure. Accordingly, sentencing is vacated and remanded for the district court's reconsideration.

IX.

In conclusion, we affirm the jury's verdict and the district court's upholding of this verdict which finds Bereano guilty

of mail fraud. The evidence is sufficient to uphold conviction under either 18 U.S.C. § 1341 or § 1346; the Maryland election laws were irrelevant and if their presentation to the jury was error, it was harmless error; there was no abuse of discretion in the voir dire procedure employed; and the use of grand jury testimony was proper impeachment evidence and was not error. Further, the district court did not err in calculating the loss sustained in regard to the sentence enhancement sought by the Government. Based upon recent precedent, however, we hold that the district court abused its discretion in granting a downward departure. Accordingly, Bereano's sentence is vacated, and his sentencing is remanded to the district court for reconsideration in light of *Koon*, *Rybicki*, and this Court's findings.

AFFIRMED IN PART AND VACATED AND REMANDED AS TO SENTENCING

WILSON, Chief District Judge, concurring in part and dissenting in part:

I concur with the majority's opinion except for part VI, in which the majority concludes that the district court properly permitted the government to read extremely damaging, and I believe clearly unadmitted, grand jury testimony during closing argument. I, therefore, respectfully dissent from this part of the opinion.

The rule that guides my dissent is quite basic: counsel may not read to the jury in closing argument material not in evidence. *See Graham v. United States*, 257 F.2d 724, 730 (6th Cir. 1958); *see also United States v. Morsley*, 64 F.3d 907, 913 (4th Cir. 1995) ("The prosecutor's statement that McKoy had pled guilty to Count 91 when no such fact was in evidence was unquestionably improper."). At trial, the

government questioned Bereano's bookkeeper, Sandra O'Hearn, about Bereano's involvement in billing and about her purported grand jury testimony. O'Hearn exculpated Bereano and answered that she could not recall what she had been asked and what she had answered before the grand jury. The government never followed up by seeking to introduce that testimony. In closing argument, however, the government read the unadmitted, purported grand jury testimony at length and commented:

> Now, if you don't believe her, *and you have good reason not to believe her because her testimony was diametrically opposed to what she said in the Grand Jury*, you then have to ask yourself the next question. Well, if she's lying, who is she lying for and why is she lying? That one you can figure out. She wasn't lying to help the government. She was lying to protect Bruce Bereano. An innocent man, ladies and gentlemen, does not need a bookkeeper to lie for him.

(emphasis added). I would find no fault had the prosecutor argued that O'Hearn's memory lapse was less than candid. However, he read O'Hearn's purported grand jury testimony as established fact and argued that it flatly contradicted her trial testimony. O'Hearn appears to have been a key player in these events, and the assertion that her trial testimony was diametrically opposed to her grand jury testimony was a powerful argument. The argument is more than problematic, however, because the court never admitted her grand jury testimony at trial, and the testimony is not even a part of the record in this court. Thus, all we have is the prosecutor's questions and O'Hearn's response that she could not remember neither the questions nor her answers before the grand jury. This exchange produced not even a scintilla of evidence to support the argument that O'Hearn's grand jury

testimony conflicted with her trial testimony.[1] Because I cannot conclude on this record that the error did not affect the outcome of the trial, I respectfully dissent.[2]

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[1] I also dissent from the second sentence of the third paragraph on page 5 of part I, in which the majority states: "O'Hearn testified before the grand jury that Bereano instructed her to bill his lobbying clients for a pro-rated portion of various political contributions under the category of legislative expenses." I dissent from this characterization because, as stated above, the grand jury testimony was not admitted and is not a part of the record before us.

[2] The majority states that O'Hearn's failure to recollect her grand jury testimony could be construed "as either a denial or an admission of her prior statements," and that the government therefore could use the grand jury testimony for impeachment purposes. I do not agree that the jury, simply from O'Hearn's failure to recollect a series of statements made 18 months earlier, could infer that she made the statements *as recited by the government*. *See Bingham v. Zolt*, 66 F.3d 553, 566 (2d Cir. 1995) (noting, in rejecting party's argument that the jury improperly was allowed to infer that he was lying, that "[i]n a sidebar, the trial judge did note that the jury could infer Zolt was lying. However . . . the judge meant that the jury could credit documentary evidence where Zolt claimed not to remember . . . [and] at no time did the judge instruct the jury that a witness's inability to recall constituted evidence of the facts asserted in an attorney's question.").

Additionally, the government used the purported grand jury testimony, not only for impeachment purposes, but also for its substantive content. The government referenced O'Hearn's testimony in the context of attempting to prove Bereano's knowledge and participation in the billing scheme, and stated that "like it or not, Miss O'Hearn's testimony helps our case immeasurably." The word "testimony" in this sentence could refer only to O'Hearn's grand jury testimony, because O'Hearn testified at trial that Bereano had not directed a scheme to bill the clients for the political contributions. This use of the grand jury testimony, even under the majority's analysis, was improper.

Finally, the fact that the grand jury testimony could have been admitted at trial, as the majority points out, is irrelevant. Having failed to enter the testimony into evidence, the government could not base its closing argument upon it. *See Johnson v. United States*, 347 F.2d 803, 805 (D.C. Cir. 1965) ("It is elementary . . . that counsel may not premise arguments on evidence which has not been admitted.").

[November 1, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
	:	
V.	:	Criminal Action No.
	:	WN-94-0208
BRUCE C. BEREANO	:	

MEMORANDUM

Pending before the Court is the Government's Motion in Limine to preclude evidence relating to (1) the investigation of the Maryland lottery contract; and (2) interpretations or amendments to the 1990 Maryland election laws by individuals other than Defendant or individuals involved in the alleged scheme to defraud. (Paper No. 34). The Defendant has opposed. (Paper No. 35). Upon a review of the pleadings and after consideration of the arguments presented at a hearing on October 28, 1994, the Court will grant the Government's Motion in Limine.

I. The Investigation of the Maryland Lottery Contract

Defendant seeks to introduce evidence relating to the Government's investigation of the Maryland lottery contract because it is relevant to "challenging the very inferences inherent in the inception of the Government's case." Defendant's Opposition to the Government's Motion in Limine ("Defendant's Opposition") at 4. The Government contends that the investigation of the Maryland lottery contract is irrelevant to the charges in this case, and should therefore be excluded.

A similar issue was presented in *United States v. Burge*, 990 F.2d 244 (6th Cir. 1992). There, the defendant sought to introduce evidence that the prosecution brought bribery charges against him because of his refusal to cooperate. *Id.* at 248. The trial judge precluded inquiry into the government's motivation for bringing the charges. *Id.* The Sixth Circuit affirmed the trial judge's ruling. While the court in *Burge* did not adopt the government's argument that evidence of the government's motive for bringing the charges is relevant only to a claim of vindictive prosecution, it held that the trial judge properly precluded evidence of the government's motives for prosecuting the case, reasoning that this evidence did not, in any significant way, cast doubt on the government's case. *Id.* at 249. In affirming the district court's decision, the court recognized the wide latitude accorded a trial judge in ruling on evidentiary matters, and also noted that the evidence excluded had a potential to confuse the jury as to the issues in the case. *Id.*

The Court finds this reasoning persuasive in this case. Here, the issue for resolution at trial is whether Defendant knowingly participated in the scheme to defraud as charged in the Indictment. In order for this evidence to be relevant, "it must be sufficiently related to the charged offense." *United States v. Rawle*, 845 F.2d 1244, 1247 n.3 (4th Cir. 1988). The manner in which the Government discovered Defendant's alleged illegal conduct is not sufficiently related to the charged offense in this case; it does not shed any light on the Government's allegation that Defendant knowingly participated in the alleged scheme to defraud. Assuming *arguendo* that the evidence is relevant, its probative value is substantially outweighed by the potential to confuse the jury as to the issues in the case. *See* Fed. R. Evid. 403.

In support of his argument that evidence relating to the Maryland lottery investigation should be admitted at trial, Defendant relies on the principle that a criminal defendant is entitled to every inference in his favor which can reasonably [be] drawn from the evidence. *See* Defendant's Opposition at 4. This reliance is misplaced. The well-established principle that Defendant cites presupposes that a court has already made a determination as to the relevance of the evidence. As noted above, the Court finds that the evidence relating to the Government's investigation of the Maryland lottery investigation is not relevant to any fact of consequence in this case. Accordingly, this evidence should be excluded.

II. Maryland State Election Law Interpretations or Amendments

On June 22, 1994 Defendant filed a Motion to Dismiss the Indictment, alleging, *inter alia*, that the Indictment wrongly characterized Maryland law. The Court ruled, in accordance with well-settled law, that violations of state law are immaterial to proving the elements of mail fraud. *See* Memorandum and Order dated August 18, 1994 at 8-9. However, the Court also recognized that violations of state law are relevant in demonstrating motive and intent. *Id.* Accordingly, the Government seeks to introduce evidence of Defendant's understanding of the election laws in effect at the time of the alleged scheme to defraud to establish Defendant's intent to engage in the scheme. Defendant now seeks to offer evidence relating to the interpretation of Maryland's election laws, including the 1987 Report of the Government's Commission to Review the Election Laws and newspaper articles discussing violations of Maryland's election laws to establish that Maryland's election laws are "vague and ill-defined." *Id.* at 4.

The issue in this case, as the Court will instruct the jury, is whether Defendant knowingly participated in a scheme to defraud, *not* whether Defendant violated Maryland's election laws. Therefore, any evidence relating to the "correct" interpretation of Maryland's election laws, by either the Government or Defendant, is irrelevant. As the Court has already indicated, evidence of *Defendant's* understanding of the election laws in effect at the time of the alleged scheme to defraud is relevant and admissible to establish motive and intent. However, how others who were not involved in the alleged scheme to defraud interpreted the law is in no way probative of Defendant's motive or intent, and should therefore be excluded. A separate Order will issue.

/s/_____
William M. Nickerson
United States District Judge

Dated: November 1, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
	:	
V.	:	Criminal Action No.
	:	WN-94-0208
BRUCE C. BEREANO	:	

ORDER

In accordance with the foregoing Memorandum and the reasons stated therein, and for the reasons stated in open court on October 28, 1994, IT IS this 1st day of November, 1994, by the United States District Court for the District of Maryland, ORDERED:

1. That Defendant's Motion in Limine to Preclude Testimony of Other Transactions, Wrongs, or Acts (Paper No. 24) IS GRANTED;

2. That Defendant's Motion in Limine to Preclude Reference to State Law (Paper No. 25) is DENIED;

3. That Defendant's Motion to Set Date for the Government to Advise Him of Its Intention to Introduce Rule 404(b) Evidence is DENIED AS MOOT;

4. That Defendant's Motion for Extended and Individual Voir Dire (Paper No. 30) is DENIED;

5. That Defendant's Motion in Limine to Preclude Reference to Client Bills Not Identified in the Indictment (Paper No. 36) is DENIED;

6. That Defendant's Motion for a Protective Order (Paper No. 37) is DENIED;

7. That the Government's Motion in Limine (Paper No. 34) is GRANTED; and

8. That the Clerk of the Court mail copies of the foregoing Memorandum and this Order to all counsel of record.

/s/_____
William M. Nickerson
United States District Judge

[August 18, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
	:	
V.	:	Criminal Action No.
	:	WN-94-0208
BRUCE C. BEREANO	:	

MEMORANDUM

On May 26, 1994, a grand jury returned an eight count indictment against Defendant, an attorney and lobbyist, charging him with mail fraud and aiding and abetting in violation of 18 U.S.C. §§ 1341, 1346, and 2. Subsequently, Defendant filed the following pre-trial motions: (1) a motion to dismiss the indictment, (2) a motion for a bill of particulars, (3) a motion to strike surplusage from the indictment, (4) a request for discovery and motion to produce documents, and (5) a motion for notice of the government's intention to use evidence at trial. Upon consideration of the pleadings and the applicable case law, the Court determines that a hearing is not necessary (Local Rule 105.6) and that Defendant's motion to dismiss the indictment will be denied; Defendant's motion for a bill of particulars will be granted in part and denied in part; Defendant's motion to strike surplusage from the indictment will be denied; Defendant's motion for discovery and to produce documents will be denied without prejudice; and Defendant's motion for notice of the government's intention to use evidence at trial will be denied.

BACKGROUND

Defendant is an employee and principal in the law firm of Bereano & Resnick, P.A., a Maryland professional corporation. During the period material to the indictment, Defendant was a registered lobbyist with the Maryland State Ethics Commission. The indictment alleges that, as a lobbyist before the Maryland legislature, Defendant "owed a fiduciary duty to each of his lobbying clients to act honestly and faithfully for and on behalf of the clients." Indictment at ¶ 3. The indictment alleges that Defendant was the chairman of the Bereano Political Action Committee ("PAC") and controlled all disbursements from the PAC. The PAC was "formed to support and/or oppose candidates for public office in the state of Maryland." *Id.* at ¶ 5.

The indictment charges that between May 1990 and June 1991, Defendant devised a scheme to defraud his lobbying clients of money and property by means of false and fraudulent pretenses, representations and promises. Specifically, the indictment alleges that Defendant billed his lobbying clients for expenses and services never incurred in order to repay political contributions. *Id.* at ¶¶ 17-18.

The essence of the alleged scheme was that Defendant would request his employees and family members to make political contributions to the campaigns of various candidates for public office in Maryland with a promise to reimburse the contributors for the full amount. Defendant reimbursed them with funds obtained from clients through false billing. The indictment also alleges that through this scheme, Defendant deprived his "lobbying clients of their right to the loyal, faithful, honest, and unbiased service and performance of the duties of the defendant in his capacity as [their] agent." *Id.* at ¶ 7(b).

I. DEFENDANT'S MOTION TO DISMISS

Defendant claims that the indictment against him should be dismissed because (1) it fails to sufficiently allege a violation of 18 U.S.C. § 1346, (2) all counts incorporate incorrect assertions about Maryland's elections laws and are subject to the statute of limitations pertaining to those laws, and (3) 4 of the 8 counts are multiplicitous.

A. Insufficient Allegation of a § 1346 Violation

The Fifth Amendment provides that "[n]o person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury . . ." U.S. Const. amend. V. The right to indictment affords "persons rightfully suspected of crimes with formal notice of the accusations against them, and an opportunity to prepare to meet those charges." *U.S. v. Mills*, 995 F.2d 480, 486 (4th Cir.), *cert. denied*, 114 S. Ct. 283 (1993). The indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). *Id.* The indictment "need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement." *Id.* On the contrary, the indictment may simply be a short, plain statement of the charge, sufficiently precise to notify the defendant of the accusation he must meet and to protect him from double jeopardy. *U.S. v. American Waste Fibers Co., Inc.*, 809 F.2d 1044, 1046 (4th Cir. 1987).

The Fifth Amendment requires that an indictment be valid enough on its face to call for a trial on the merits. *Costello v. U.S.*, 350 U.S. 359, 363 (1956). In considering a defendant's motion to dismiss an indictment challenging the sufficiency of the indictment, the Court views the evidence in the "light most favorable to the Government . . . and must

accept as true the allegations of the indictment." *U.S. v. ReBrook*, 837 F. Supp. 162, 166 (S.D. W. Va. 1993) (citing *Mills*, 995 F.2d at 489). The Court is to test whether the "indictment sufficiently charges the offenses it sets forth against Defendant." *Id.* (citing *U.S. v. Sampson*, 371 U.S. 75, 78-79 (1962)). The Supreme Court stated that "[i]t is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.'" *Hamling v. U.S.*, 418 U.S. 87, 117 (1974) (citing *U.S. v. Carll*, 105 U.S. 611, 612 (1882)).

The indictment charges Defendant with violations of 18 U.S.C. §§ 1341, 1346, and 2. Defendant does not challenge the suffciency of the § 1341 charge, but argues that he cannot "discern from the Indictment what the § 1346 charges are or how they are measurably different than the § 1341 allegations." Defendant's Memorandum at 6-7.

18 U.S.C. § 1341 (West Cum. 1994) codifies the mail fraud statute and states in pertinent part:

> Whoever, having devised or intending to devise any *scheme or artifice to defraud*, or for obtaining money or property by means of false or fraudulent pretenses, representations . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing . . . shall be fined not more than $1,000 or imprisoned not more than five years. . . .

(emphasis added). Section 1346 defines a "scheme or artifice to defraud" as a scheme or artifice "to deprive another of the intangible right of honest services."

The enactment of § 1346 was a response to the Supreme Court's decision in *McNally v. U.S.*, 483 U.S. 350 (1987), which limited the application of the mail fraud statute to cases involving actual loss of money or property. *U.S. v. Berg*, 710 F. Supp. 438 (E.D.N.Y. 1989), *aff'd in part, rev'd in part on other grounds sub nom., U.S. v. Schwartz*, 924 F.2d 410 (2d Cir. 1991); *see also*, 134 Cong. Rec. H 11251 (October 21, 1988) (statements of Representative John Conyers, floor sponsor of the amendment).[1] Prior to the *McNally* decision, the Fourth Circuit, as well as other Circuits, applied § 1341 to include schemes designed to defraud others of intangible rights. *U.S. v. Mandel*, 591 F.2d 1347 (4th Cir. 1979), *aff'd in relevant part*, 602 F.2d 653 (4th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 961 (1980). These rights included not only the right to honest government, *U.S. v. Silvano*, 812 F.2d 754 (1st Cir. 1987), but also fiduciary rights embodied in employer-employee and principal-agent relationships. *U.S. v. Bronston*, 658 F.2d 920 (2d Cir. 1981) (attorney concealing material information from client), *cert. denied*, 456 U.S. 915 (1982). *See also, U.S. v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983) (employee receiving kickbacks from third parties), *cert. denied*, 467 U.S. 1226 (1984); *U.S. v. Siegel*, 717 F.2d 9 (2d Cir. 1983) (embezzled company funds); and *U.S. v. Curry*, 681 F.2d

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[1] Shortly after *McNally*, the Supreme Court held that the mail fraud statute protected not only tangible forms of property, but intangibles forms as well. *Carpenter v. U.S.*, 484 U.S. 19 (1987) (Wall Street Journal's interest in the confidentiality and timing of its columns was a property right protected by the mail fraud statute).

406 (5th Cir. 1982) (right to correct financial disclosure from political action committee chairman). By enacting § 1346, Congress made it a criminal violation to defraud anyone of an intangible right to honest services by utilizing the mails. *See U.S. v. D'Alessio*, 822 F. Supp. 1134, 1148 (D.N.J. 1993) ("Congress passed 18 U.S.C. § 1346 which overruled *McNally* to the extent that it re-allowed prosecutions based on violations of another's right to 'honest services.'").

Defendant's principal argument is that the indictment, "[i]n juxtaposition to the explicit allegation under § 1341 . . . is silent . . . as to the way in which § 1346 was allegedly violated." Defendant's Memorandum at 5. Defendant contends that the indictment "never alleges the means or ways in which the victim clients were defrauded." *Id.* The Court cannot agree. The indictment charges that Defendant, an attorney and lobbyist, devised a scheme and artifice to "defraud his lobbying clients of their right to the loyal, faithful, honest, and unbiased service and performance of the duties of the defendant in his capacity as agent of said lobbying clients . . ." Indictment at ¶ 7(b). The indictment states that the alleged scheme involved the fraudulent billing of clients under the ruse of legislative entertainment and that those funds were used to reimburse Defendant's employees and family members for campaign contributions they made at his behest. *Id.* at ¶¶ 8-16. The indictment specifies that Defendant defrauded his clients of approximately $16,000 through this scheme. *Id.* at ¶ 18(5). The indictment sets forth a "plain, concise and definite written statement of the essential facts constituting the offense charged" as required by Fed. R. Crim. P. 7(c)(1). Therefore, the indictment has adequately notified Defendant of the charges against him. *See Hamling*, 418 U.S. at 117; *see also, Mills*, 995 F.2d at 486.

B. Indictment Wrongly Characterizes Maryland Law

Defendant next argues that the "indictment wrongly characterizes Maryland's election laws and ignores the time bar to prosecutions based on alleged election law violations." Defendant's Memorandum at 11. Defendant claims that ¶¶ 6 and 13 (which are incorporated into each of the eight counts) of the indictment incorrectly state Maryland law.[2] Basically, Defendant contends that the indictment inaccurately alleges that the Bereano PAC was prohibited under Maryland law from receiving contributions in excess of $2,500. The incorrect statement of Maryland law "is clearly fundamentally unfair" and the grand jury "was substantially influenced by this false statement of the law." *Id.* at 17. Therefore, Defendant was "undeniably prejudiced." *Id.*

Defendant's arguments are without merit. Defendant acknowledges that "*[s]tate law is irrelevant* to proving the essential elements of mail fraud." Defendant's Reply at 12-

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[2] Paragraph 6 of the indictment alleges that:

> [a]t all times material to this Indictment, the Annotated Code of Maryland, Article 33, section 26-9 prohibited any individual or corporate entity from contributing in excess of $1,000 to any one candidate or in excess of a total of $2,500 to any group of candidates in any primary or general election for public office in the state of Maryland and prohibited any individual or corporate entity from contributing in excess of $2,500 to any Maryland state political action committee in any primary or general election.

Paragraph 13 of the indictment alleges that "[i]t was further a part of the scheme and artifice to defraud that Bruce C. Bereano's family members used the money given to them by Bruce C. Bereano described in paragraph 11 to make contributions to the Bereano PAC in their own names."

13 (emphasis added). To sustain a conviction under the mail fraud statute, the government must show:

(1) the existence of a scheme to defraud;
(2) participation by defendant in the particular scheme charged with a specific intent to defraud; and
(3) the use of the mails in furtherance of the scheme.

Schmuck v. U.S., 489 U.S. 705, *reh'g denied*, 490 U.S. 1076 (1989); *U.S. v. Burks*, 867 F.2d 795 (3d Cir. 1989); *U.S. v. Murr*, 681 F.2d 246, 248 (4th Cir.), *cert. denied*, 459 U.S. 973 (1982). While violation of state law is immaterial to proving the elements of mail fraud, it may be relevant in demonstrating motive and intent. *See U.S. v. Ham*, 998 F.2d 1247, 1254 (4th Cir. 1993) ("Fraudulent intent may be inferred from the totality of the circumstances and need not be proven by direct evidence.").

In *Mandel*, defendants appealed their convictions of racketeering and mail fraud involving a scheme to bribe Governor Mandel and to conceal and misrepresent material information concerning a local race track. *Mandel*, 591 F.2d at 1347. While cautioning that the "mail fraud statute should be carefully and strictly construed in order to avoid extension beyond the limits intended by Congress," the Fourth Circuit dismissed a defense argument that the prosecution and conviction constituted an "unwarranted overextension of that statute and an impermissible federal intrusion into the political affairs of the State of Maryland." *Id.* at 1357. The court found this argument to be without merit because the purpose of the mail fraud statute is simply to prevent the use of the postal service as a means to carry out fraudulent schemes. The court reasoned that:

> [e]ven if the substance of the scheme to defraud involves matters normally within the purview of state control or regulation, once the mails are utilized to effectuate the scheme, the federal government has the right to prosecute the schemer under the mail fraud statute . . . the fact that the alleged scheme to defraud involved matters traditionally of state concern is not a defense to the prosecution.

Id. at 1358-59. The court stated that "the fact that a scheme to defraud may or may not violate state law does not determine whether the scheme is within the proscription of the mail fraud statute." *Id.* at 1361 (citations omitted). *See also, U.S. v. Mandel*, 415 F. Supp. 997, 1009 (D. Md. 1976) ("the question of whether or not a certain course of conduct is punishable under state laws or regulations is entirely beside the point and immaterial to a mail fraud prosecution.") (citation omitted), *aff'd in relevant part*, 602 F.2d 653 (4th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 961 (1980); *U.S. v. Shamy*, 656 F.2d 951, 957 (4th Cir. 1981) (A "'scheme or artifice to defraud' within the meaning of the mail and wire fraud statutes is not limited to fraudulent schemes within the meaning of the common law or as prohibited by state law."), *cert. denied*, 455 U.S. 939 (1982); *U.S. v. Margiotta*, 688 F.2d 108, 124 (2d Cir. 1982) ("a violation of local law is not an essential element of a scheme to defraud in contravention of 18 U.S.C. § 1341"), *cert. denied*, 461 U.S. 913 (1983). Because state law violations are irrelevant in proving mail fraud, whether the government mischaracterized Maryland election laws is immaterial.

Defendant continues his state law argument by contending that "under Maryland law, a prosecution for any alleged violation of the [Fair Election Practices Act] has

long been time barred . . ." Defendant's Memorandum at 18. Defendant is not charged under that Act and its limitations period, therefore, is irrelevant. The present indictment satisfies the 5-year statute of limitations applied to mail fraud. 18 U.S.C. § 3282; *U.S. v. Italiano*, 701 F. Supp. 205, 206 (M.D. Fla. 1988), *aff'd*, 894 F.2d 1280 (11th Cir.), *cert. denied*, 498 U.S. 896 (1990). For the same reason, Defendant's argument that the failure to inform the grand jury of the running of the Maryland statute of limitations warrants dismissal of the indictment also fails.

C. The Indictment Is Multiplicitous

Defendant argues that the indictment is multiplicitous, requiring the dismissal of four of the eight counts. Counts 1, 3, 5, and 7 each allege that Defendant knowingly and willfully caused bills to be delivered by mail. Counts 2, 4, 6, and 8 allege that as a result of the bills listed in Counts 1, 3, 5, and 7, Defendant knowingly and willfully caused his clients to use the mail to deliver checks for payment of services. Defendant claims that by structuring the counts in this manner, the government has improperly charged him twice for each single, unified transaction of one billing and payment.

The Court finds this argument to be unpersuasive. The indictment is not multiplicitous as a matter of law. Multiplicity means the "charging of a single offense in several counts." *U.S. v. Burns*, 990 F.2d 1426, 1438 (4th Cir.) (citation omitted), *cert. denied sub nom., LaForney v. U.S.*, 113 S. Ct. 2949 (1993). The danger of multiplicity is that it implicates the Double Jeopardy Clause of the Fifth Amendment which protects a defendant against multiple punishments for the same offense. *Ohio v. Johnson*, 467 U.S. 493, 498 (1984) (citations omitted).

In the seminal case of *Badders v. U.S.*, 240 U.S. 391 (1916), the Supreme Court held that each separate use of the mails to further a scheme to defraud is a separate offense, punishable as such under the mail fraud statute. This holding has been followed by the Circuit Courts. *See U.S. v. McClelland*, 868 F.2d 704, 706 (5th Cir. 1989) ("Each separate use of the mails to further a scheme to defraud is a separate offense."); *U.S. v. Ledesma*, 632 F.2d 670, 679 (7th Cir.) ("each mailing in furtherance of a scheme to defraud is a separate offense under 18 U.S.C. § 1341 even if there is but one scheme involved."), *cert. denied*, 449 U.S. 998 (1980); *U.S. v. Eskow*, 422 F.2d 1060, 1064 (2d Cir.) ("Since each mailing pursuant to an alleged scheme to defraud constitutes a separate offense, . . . the *indictment is not vulnerable to a claim of multiplicity.*") (emphasis added) (citations omitted), *cert. denied*, 398 U.S. 959 (1970); *see also, Mandel*, 591 F.2d at 1360; *U.S. v. Perkal*, 530 F.2d 604, 606 (4th Cir.), *cert. denied*, 429 U.S. 821 (1976).

Upon consideration of the pleadings and the relevant case law, the Court is satisfied that the present indictment is plainly sufficient to inform Defendant of the charges against him. As stated herein, Defendant's argument in support of his motion to dismiss the indictment is without merit. Accordingly, Defendant's motion to dismiss the government's indictment is denied.

* * * * *

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss the indictment is denied; Defendant's motion for a bill of

particulars is granted in part and denied in part; Defendant's motion to strike surplusage from the indictment is denied; Defendant's motion for discovery and to produce documents is denied without prejudice; and Defendant's motion for notice of the government's intention to use evidence at trial is denied. A separate Order will issue.

/s/_____
William M. Nickerson
United States District Judge

Dated: August 18, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
	:	
V.	:	Criminal Action No.
	:	WN-94-0208
BRUCE C. BEREANO	:	

ORDER

In accordance with the foregoing Memorandum and the reasons stated therein, IT IS this 18th day of August, 1994, by the United States District Court for the District of Maryland, ORDERED:

1. That Defendant's Motion to Dismiss the Indictment (Paper No. 8) IS DENIED;

2. That Defendant's Motion for a Bill of Particulars (Paper No. 4) IS GRANTED ONLY AS TO PARAGRAPH 18(5) of the Indictment and IS DENIED as to the rest of the motion;

3. That Defendant's Motion to Strike Surplusage from the Indictment (Paper No. 5) IS DENIED;

4. That Defendant's Request for Discovery and Motion to Produce Documents (Paper No. 7) IS DENIED WITHOUT PREJUDICE AND SUBJECT TO RECONSIDERATION in the event that counsel for Defendant and the Government submit a joint motion for stipulated discovery and production of documents on or before September 12, 1994;

5. That Defendant's Motion for Notice of the Government's Intention to Use Evidence at Trial (Paper No. 6) IS DENIED; and

6. That the Clerk of the Court mail copies of the foregoing Memorandum and this Order to all counsel of record.

/s/_____
William M. Nickerson
United States District Judge

FILED: October 22, 1998

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 95-5312, 95-5395

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

BRUCE C. BEREANO,

Defendant-Appellant.

ORDER

On September 11, 1998, Appellant submitted a Petition for Rehearing and Suggestion for Rehearing En Banc. The panel has voted to deny appellant's petition for rehearing, and no Judge on the Fourth Circuit Court of Appeals has indicated that he / she would vote to rehear the case en banc. Accordingly, appellant's petition for rehearing is **DENIED**.

The Clerk is **REQUESTED** to send a copy of this Order to all counsel of record.

It is so **ORDERED**.

/s/_____
HENRY COKE MORGAN, JR.
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
October 20, 1998

STATUTORY PROVISIONS

Title 18 of the United States Code, §§ 1341 and 1346

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

§ 1346. Definition of "scheme or artifice to defraud"

For purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

Supreme Court, U.S.
FILED
FEB 4 1999
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(2)

No. 98-1165

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BRUCE C. BEREANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in all 50 states. The American Bar Association ("ABA") recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. The NACDL was founded in 1958 to promote research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and to ensure that criminal statutes are properly construed and applied.

REASONS FOR GRANTING THE WRIT

The questions presented by this case go to the fundamental meaning of the "honest services" amendment to the federal mail fraud statute, 18 U.S.C. § 1346, a commonly utilized statute with potentially unlimited application. The key terms of this twenty-seven word statute are ambiguous in both meaning and scope. Federal prosecutors have seized on this uncertainty in the statute and have wreaked havoc in individuals' lives as the government threatens and brings criminal charges based on an unconstrained view of "honest services." The dangers in such a broad interpretation of Section 1346 – exemplified by the instant case in which Petitioner's conviction stemmed from alleged misstated descriptions in invoices sent to private clients who testified that they had not suffered any harm – is that it effectively sanctions the creation of a federal integrity police.

Such concerns are heightened by the split in the circuit courts of appeals about whether a state law violation must be proved in a Section 1346 case. Absent such a requirement, the constitutional infirmities of the statute are pervasive: fair notice of the prohibited conduct is lacking; courts and prosecutors, as opposed to legislators, are defining the

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1. Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amicus curiae*, its members, or counsel, have made a monetary contribution to the preparation or submission of the brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court in accordance with Supreme Court Rule 37.2(a) (1998).

proscribed acts; and, contrary to core tenets of federalism, the federal government is free to set standards to govern state and local relationships.

It is essential that this Court define the appropriate breadth of Section 1346 with respect to the statute's application to private relationships and the role state law should play in determining a violation. Only then can the circuit courts of appeals receive much needed guidance as to the meaning and scope of this vague and amorphous statute, and can prosecutors invoke the statute with the consistency and precision that the Constitution mandates. Indeed, this case squarely presents two of the most important issues regarding possible constraints on the reach of Section 1346 – the inapplicability of the statute to private relationships and the requirement of a state law violation to define the reach of "honest services." The substantial and recurring questions presented by Petitioner thus merit this Court's review.

I. THIS COURT SHOULD REVIEW WHETHER SECTION 1346 IS APPLICABLE TO PRIVATE CONTRACTUAL RELATIONSHIPS

The language of Section 1346 is hopelessly ambiguous. Congress left undefined the prohibited conduct – depriving another of the "intangible right of honest services." As a consequence, prosecutors and lower courts have had to resolve questions such as what is an "intangible right;" what are "honest services;" and who is the "deprivor" and the "deprivee" that the statute had been intended to punish and protect, respectively. Resolution by this Court of the breadth of Section 1346 is thus critical.

The possible definitions of the statute's key terms suggest that dishonesty alone may constitute a crime. When applied to private relationships, it enables prosecutors to seek to criminalize every breach of contract or misstatement made in the course of dealing. By its terms, Section 1346 risks metastasizing federal criminal liability by setting standards to govern traditional state and local relationships. Indeed, many of the courts that have struggled with these issues have recognized that application of Section 1346 to the private sector raises "troublesome issues," *United States v. Jain*, 93 F.3d 436, 441-42 (8th Cir. 1996), and poses "special risks." *United States v. Sun-Diamond Growers of California*, 138 F.3d 961, 973 (D.C. Cir.), *cert. granted on other grounds*,

119 S. Ct. 402 (1998); *see also United States v. Cochran*, 109 F.3d 660 (10th Cir. 1997); *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 40 (1998).

The heightened concern raised by lower courts about utilizing Section 1346 to regulate private relationships stems from, among other things, defining with precision the "honest services" that a private individual is entitled to receive in a transaction. In contrast to relationships in the government context, dealings in the private sector are structured in myriad ways and disparate expectations are brought to bear. Ethereal concerns, such as receiving honest services when no tangible harm has resulted, are typically of scant interest to private parties whose focus is trained largely at a transaction's economic outcome. *See Carpenter v. United States*, 484 U.S. 19, 25 (1987). The difficulty in defining the intangible right of honest services in private relationships is underscored by Petitioner's case in which the "victims," after learning of the government's allegations, testified that they did not suffer any injury and had continued to employ Petitioner.

In the wake of prosecutors seeking to apply aggressively Section 1346 to private relationships, the lower courts have struggled to divine the key terms and breadth of the statute. A number of these courts have broadly applied the statute to the private sector, raising troubling and important threshold issues. It is time for this Court to address and to clarify these basic questions of statutory construction, which recur with great frequency and have a profound impact on individuals' liberty. Indeed, the current lack of precision in Section 1346 raises serious concerns about the constitutional requirement that fair notice be given of the specific conduct that constitutes a crime. *United States v. Lanier*, 117 S. Ct. 1219, 1225 (1997); *see also Fasulo v. United States*, 272 U.S. 620, 629 (1926) (interpreting predecessor version of mail fraud statute, Court cautioned that "[t]here are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute.").

These fundamental and recurring issues – about which numerous circuit courts of appeals have expressed concern, and that go to the heart of Section 1346 – merit this Court's review.

II. THIS COURT SHOULD REVIEW THE FUNCTION OF STATE LAW IN SECTION 1346 CASES

A broad reading of Section 1346, in which the Federal Government is permitted to set standards for private state and local relationships, implicates core federalism principles. This Court paid heed to similar concerns in *McNally v. United States*, when it held that a broad construction of the mail fraud statute would "leave[] its outer boundaries ambiguous and involve[] the Federal Government in setting standards" governing state and local relationships. 483 U.S. 350, 360 (1987); *see also United States v. Brumley*, 116 F.3d 728, 734 (5th Cir.), *cert. denied*, 118 S. Ct. 625 (1997) (expansive reading of Section 1346 risks "erod[ing] our federalist structure").

These federalism issues are exacerbated considerably by the decision of the court of appeals below that a Section 1346 case need not be predicated on a violation of state law. Petitioner's conviction thus stemmed neither from an underlying state law violation, nor from any federal statutory definition of "honest services." Instead, the prosecutor, unconstrained by any legislature's view of proper ethical conduct, was free to espouse (and obtain a conviction and affirmance based on) a personal view of propriety in a private contractual relationship.

The circuit courts of appeals are sharply divided on the issue of whether there must be proof in a Section 1346 prosecution of a state law violation to establish and define the statutory element of "honest services." *Compare Brumley*, 116 F.3d at 734 ("We decide today that services must be owed under state law and that the government must prove in a federal prosecution that they were in fact not delivered.") *and United States v. Bryan*, 58 F.3d 933, 940 (4th Cir. 1995) ("[T]he fact that a scheme to defraud may or may not violate state law does not determine whether the scheme is within the proscription of the mail fraud statute."). Given the important federalism concerns implicated, this split in the circuit courts of appeals requires resolution.

In addition to federalism issues, other significant constitutional concerns are implicated by this split in the circuit courts of appeals. These potential constitutional infirmities include the following: (1) Absent the constraint of a state law violation in a Section 1346 prosecution, the task of defining the proscribed conduct is left to prosecutors and courts

– an apparent violation of separation of powers principles; (2) Fair notice of proscribed conduct is lacking when the potentially unlimited breadth of Section 1346 – as opposed to well-established principles of state law – form the foundation for "honest services" prosecutions; and (3) The failure of Congress to tether the broad and amorphous language of Section 1346 to an underlying state law violation results in constitutionally excessive authority being vested in federal prosecutors.

The role of state law in Section 1346 cases is thus a critically important issue that merits this Court's review. The need for review is heightened further by the split of authority in the circuit courts of appeals.

CONCLUSION

For all of these reasons, the National Association of Criminal Defense Lawyers urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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February 2, 1999

(3)

Supreme Court, U.S.
FILED
APR 19 1999
CLERK

No. 98-1165

In the Supreme Court of the United States

OCTOBER TERM, 1998

BRUCE C. BEREANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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21PP

QUESTIONS PRESENTED

1. Whether the criminal prohibition against schemes to defraud victims of "the intangible right of honest services," under 18 U.S.C. 1346, applies to private persons as well as public officials.

2. Whether the government must show a source in state law for a "right to honest services" under Section 1346.

3. Whether a defendant must contemplate harm to the victim to be guilty of mail fraud.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1165

BRUCE C. BEREANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is unpublished, but the judgment is noted at 161 F.3d 3 (Table). The opinions of the district court (Pet. App. 44a-47a, 50a-61a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1998. A petition for rehearing was denied on October 22, 1998. Pet. App. 64a-65a. The petition for a writ of certiorari was filed on January 20, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of seven counts of mail fraud, in violation of 18 U.S.C. 1341.[1] He was sentenced to five years' probation and fined $20,000. The court of appeals affirmed petitioner's convictions but remanded for resentencing. Pet. App. 1a-43a.

1. Petitioner was an attorney and a registered Maryland lobbyist. From May 1990 to June 1991, he asked employees of his law firm and various family members to write checks for political contributions, which were then distributed to candidates directly or through petitioner's political action committee. The employees and family members received reimbursements through checks from petitioner's law firm. Petitioner billed his lobbying clients for those campaign contributions on a pro rata basis, describing the nominee contribution expenses as "legislative entertainment." Petitioner's retainer agreements did not authorize him to bill his clients for such contributions. Rather, the lobbying clients had agreed to pay petitioner a fixed retainer, as well as "reasonable and necessary expenses" including "legislative entertainment," defined by petitioner as meals and entertainment. Pet. App. 3a-4a.

Petitioner was charged with eight counts of mail fraud under 18 U.S.C. 1341 and 1346. The indictment set out two theories of prosecution. It alleged that petitioner had engaged in a scheme (1) to defraud clients of money and property by submitting bills that included

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[1] One mail fraud count was dismissed pursuant to petitioner's motion for a judgment of acquittal. See Pet. App. 3a n.1.

false statements of expenses incurred, and (2) to defraud clients of their right to petitioner's honest and loyal services. Pet. App. 3a-4a.[2]

2. Before trial, both petitioner and the government sought rulings in limine concerning the admissibility of evidence relating to Maryland election laws. The district court determined that a violation of Maryland election laws was both unnecessary and insufficient to establish mail fraud violations, and the court therefore did not allow petitioner to prove and argue his compliance with those laws. The court, however, permitted the government to introduce into evidence a letter to a client in which petitioner had explained the Maryland election laws as he understood them, as well as the copies of the Maryland election statutes that petitioner had attached to the letter. The district court instructed the jury that the evidence was relevant only to petitioner's motive and intent. Pet. App. 4a-5a, 19a-21a, 46a-47a.

At trial, the clients who had been billed for the campaign contributions testified that they had perceived no fraud either when they paid their bills or at the time of the trial. They also testified, however, that they had not authorized petitioner to make political contributions and had not agreed to pay them. Pet. App. 6a, 11a.

3. The court of appeals affirmed petitioner's convictions in an unpublished decision. Pet. App. 1a-43a.[3]

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[2] The federal mail fraud statute prohibits the use of the mails in furtherance of "any scheme or artifice to defraud." 18 U.S.C. 1341. Section 1346 provides that "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346.

a. The court of appeals first held that the evidence introduced at trial was sufficient to sustain the mail fraud convictions. Pet. App. 8a-12a. The court stated that the circuits are divided on the question whether the mail fraud statute requires proof that the defendant contemplated the prospect of harm to the victim. *Id.* at 8a-9a. The court concluded, however, that it need not resolve the question because "contemplated harm is present in this case. The contemplated harm is [petitioner's] fraudulent transfer to his clients of his cost of doing business which cost took the form of political contributions." *Id.* at 10a.

Petitioner contended that no contemplated harm was present in this case because the victims of the scheme had testified that they were satisfied with petitioner's services. The court of appeals rejected that claim, holding that the victims' perception was irrelevant to the question whether petitioner had devised a scheme or had acted with the requisite intent to defraud. Pet. App. 10a-11a. The court also observed that "while [petitioner's] clients argue that they were satisfied with [petitioner's] services, they also testified that they did not authorize and would not have knowingly paid for the political contributions [petitioner] made." *Id.* at 11a. Explaining that "[s]ending a false bill to a third party through the mails with the necessary criminal intent is a classic violation of the mail fraud statute," *ibid.*, the court concluded that "the totality of the evi-

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[3] The court of appeals remanded for resentencing, holding that the district court had relied on impermissible reasons in granting a downward departure from the Guidelines sentencing range. Pet. App. 34a-41a. That aspect of the court of appeals' ruling is not at issue in this Court. On remand, petitioner was sentenced to five months' imprisonment, to be followed by a three-year term of supervised release. See 12/4/98 Amended Judgment 2-3.

dence presented is sufficient to support a finding that [petitioner] had a specific intent to defraud, including contemplating harm to his clients," *id.* at 11a-12a.

b. The court of appeals rejected petitioner's claim that 18 U.S.C. 1346, which defines the term "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services," applies only to public officials. The court noted that "[t]he plain language of the statute does not restrict its application to public officials." Pet. App. 13a. The court also explained that Section 1346 was intended to restore the state of the law that had existed before this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987). Pet. App. 14a. The court observed that "[i]n addition to the right to honest Government, pre-*McNally* cases held that the intangible rights covered [by 18 U.S.C. 1341] included an employer's or other principal's right to the honest, faithful and disinterested services of its employees or agents." *Id.* at 13a.

The court also held that the indictment described the alleged offenses with adequate particularity. Because the indictment described the fiduciary duty owed by petitioner to his clients, as well as the scheme to bill those clients for expenses they had not authorized, it sufficiently apprised petitioner of the charges against him. Pet. App. 16a-18a. The court also found that, even if the indictment lacked sufficient particularity as to Section 1346, or there was insufficient evidence to uphold a conviction for mail fraud under Section 1346 based on a deprivation of honest services, there was sufficient evidence to sustain a conviction for mail fraud under Section 1341 based on petitioner's scheme to deprive his clients of money or property. *Id.* at 18a.

c. The court of appeals rejected petitioner's argument that evidence of Maryland election laws was improperly admitted at trial. Pet. App. 19a-21a. It noted that a conviction for mail fraud does not require proof of any violation of state law. *Id.* at 19a-20a. The court found, however, that the district court had properly allowed the government to introduce evidence concerning those laws in order to establish petitioner's knowledge and intent. Because "[petitioner's] understanding of the election laws arguably explains his motive and intent for choosing the particular scheme which he utilized," the court explained, the contested evidence was "probative of bad motive or intent as opposed to good faith." *Id.* at 21a.

The court of appeals also held that the prosecutor's references in closing argument to the state election laws "were made within the context of [petitioner] sending the statutes to his clients, allegedly showing what his understanding of the law was." Pet. App. 20a. The court emphasized that statements by the prosecutor implying that petitioner had actually violated the election laws "represented a minor portion of an extensive argument," and that the district court had instructed the jury that Maryland election laws were relevant only to petitioner's motive and intent. *Id.* at 20a; see also *id.* at 21a-26a (rejecting claim of prosecutorial misconduct based on prosecutor's references to state election laws).[4]

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[4] The court of appeals also rejected petitioner's claims that the indictment had been improperly amended (Pet. App. 26a-28a); that the district court had erred in denying petitioner's motion for individualized voir dire (*id.* at 28a-31a); and that the district court had improperly allowed the government to rely in its closing argument on grand jury testimony that had not been introduced into evidence (*id.* at 31a-34a). Petitioner does not press those

ARGUMENT

Petitioner contends that 18 U.S.C. 1346 applies only to public officials; that under Section 1346 the victim's right to honest services must be defined by state law; and that a defendant must contemplate the prospect of harm to the victim in order to violate the mail fraud statute. Those claims lack merit and do not warrant this Court's review.

1. As an initial matter, this case would be an inappropriate vehicle for resolving petitioner's claims regarding the proper application of Section 1346. This case was presented to the jury both on an "honest services" theory and on the theory that petitioner's scheme defrauded his clients of money and property. Petitioner correctly notes (Pet. 23 n.19) that a guilty verdict generally cannot stand when a case is submitted to the jury on alternative theories and one of the theories is invalid as a matter of law. See *Griffin* v. *United States*, 502 U.S. 46 (1991); *Yates* v. *United States*, 354 U.S. 298, 312 (1957). Reversal is not required, however, when the jury's verdict necessarily encompasses findings as to all elements of the offense under the valid theory of prosecution. See, *e.g.*, *United States* v. *Perholtz*, 842 F.2d 343, 365-367 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988); *United States* v. *Webster*, 639 F.2d 174, 181 (4th Cir.), cert. denied, 454 U.S. 857 (1981); *United States* v. *Dixon*, 536 F.2d 1388, 1402 (2d Cir. 1976). Compare *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993) (instructional error is harmless when the findings on which the jury's verdict necessar-

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claims in this Court. Judge Wilson agreed with the majority's disposition of all issues except for the prosecutor's use of the grand jury testimony, but would have reversed petitioner's convictions on that ground. *Id.* at 41a-43a.

ily rests are "functionally equivalent" to a finding of guilt under a proper instruction).

That principle applies here. The gravamen of the "honest services" theory of prosecution in this case was that petitioner had deprived his clients of their right to his honest services by billing them for "entertainment expenses" that he did not incur. Because the jury's verdict necessarily reflected its determination that petitioner fraudulently deprived his clients of money, the court of appeals' affirmance of his convictions would be proper regardless of whether Section 1346 applies to his conduct. See *United States* v. *Lopez*, 100 F.3d 98, 102-104 (9th Cir. 1996), cert. denied, 520 U.S. 1231 (1997); *United States* v. *Pimentel*, 83 F.3d 55, 60 (2d Cir. 1996); *United States* v. *Baker*, 78 F.3d 1241, 1247-1248 (7th Cir. 1996), cert. denied, 520 U.S. 1222 (1997).

2. Petitioner contends (Pet. 14-23) that 18 U.S.C. 1346 applies only to the "services" of public officials or persons with fiduciary duties to the public. This Court recently denied four petitions for certiorari (arising from a single court of appeals decision) presenting the same question. See *Frost* v. *United States*, 119 S. Ct. 40 (1998) (No. 97-1549); *Turner* v. *United States*, 119 S. Ct. 41 (1998) (No. 97-8295); *Potter* v. *United States*, 119 S. Ct. 41 (1998) (No. 97-8305); *Congo* v. *United States*, 119 S. Ct. 41 (1998) (No. 97-8328). There is no reason for a different result here.

a. The text of Section 1346 does not distinguish between public officials and private actors, like petitioner, who owe a duty of loyalty to clients or employers. Section 1346 defines the term "scheme or artifice to defraud," for purposes of the mail fraud statute, to include "a scheme or artifice to deprive another of the intangible right of honest services." As the court of appeals recognized, "[t]he plain language of the statute

does not restrict its application to public officials." Pet. App. 13a.

b. The history of Section 1346 likewise provides no support for petitioner's position. Before this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), the courts of appeals had consistently construed the mail and wire fraud statutes to apply to schemes intended to deprive citizens of their right to honest services from public officials. In addition, numerous pre-*McNally* cases held that the intangible rights covered by the statute included the right of a private employer or other principal to the honest and faithful services of its employees or agents. See, *e.g.*, *United States* v. *Dial*, 757 F.2d 163, 168-170 (7th Cir.), cert. denied, 474 U.S. 838 (1985); *United States* v. *Lemire*, 720 F.2d 1327, 1335-1336 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984); *United States* v. *Siegel*, 717 F.2d 9, 14 (2d Cir. 1983); *United States* v. *Bohonus*, 628 F.2d 1167, 1171-1172 (9th Cir.), cert. denied, 447 U.S. 928 (1980); *United States* v. *McCracken*, 581 F.2d 719, 722-723 (8th Cir. 1978).[5]

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[5] Relying on *United States* v. *Gray*, 790 F.2d 1290, 1295 (6th Cir. 1986), rev'd *sub nom. McNally* v. *United States*, 483 U.S. 350 (1987), petitioner claims (Pet. 18-19 & n.13) that pre-*McNally* case law limited the "intangible rights" doctrine to schemes involving the services of public officials. Although the court in *Gray* suggested that the mail fraud statute, as lower courts had construed it before *McNally*, did not apply to schemes by private fiduciaries to defraud private parties of their right to honest services, the Sixth Circuit, sitting en banc, subsequently rejected that suggestion. See *United States* v. *Runnels*, 877 F.2d 481, 483-484 (6th Cir. 1989) (en banc) ("The trial judge, correctly in our opinion, read *Gray* to have no effect on the doctrine that the intangible rights theory was 'applicable to non-public officials where a fiduciary duty is involved.'"). In *United States* v. *Frost*, 125 F.3d 346, 366 (1997), cert. denied, 119 S. Ct. 40, 41 (1998), the Sixth Circuit reviewed the

In *McNally*, this Court held that the mail fraud statute is "limited in scope to the protection of property rights." 483 U.S. at 360. The Court stated that Congress "must speak more clearly than it has" in order to criminalize a broader range of fraudulent conduct. *Ibid.* The following year, Congress amended the federal fraud statutes to add Section 1346. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508. The sponsor of the amendment explained that Section 1346 "restores the mail fraud provision to where that provision was before the McNally decision." 134 Cong. Rec. 33,297 (1988) (statement of Rep. Conyers). Because pre-*McNally* case law had applied the mail fraud statute to private-sector deprivations of the right to "honest services," the history of Section 1346 reinforces the conclusion that such deprivations are covered by the statute in its current form.[6]

c. No decision of a court of appeals has held that private-sector frauds fall outside of Section 1346. As petitioner correctly notes (Pet. 3-4, 14), some courts of appeals have expressed concern about "defin[ing] the outer limits of the private sector rights to 'honest

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pre-*McNally* law and concluded that "private individuals * * * may commit mail fraud by breaching a fiduciary duty and thereby depriving the person or entity to which the duty is owed of the intangible right to the honest services of that individual."

[6] Petitioner argues (Pet. 21) that the rule of lenity bars application of Section 1346 to private-sector relationships. The rule of lenity, however, is a maxim of construction that applies "only if, after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *United States* v. *Wells*, 519 U.S. 482, 499 (1997) (citations, ellipsis, and internal quotation marks omitted). Here, the text of Section 1346 unambiguously encompasses private-sector deprivations of the right to honest services, and the statute's history reinforces that interpretation.

services' that are now protected by § 1346." *United States* v. *Jain*, 93 F.3d 436, 442 (8th Cir. 1996), cert. denied, 520 U.S. 1273 (1997); see also *Frost*, 125 F.3d at 365; *United States* v. *Cochran*, 109 F.3d 660, 667 (10th Cir. 1997); *United States* v. *Sun-Diamond Growers of California*, 138 F.3d 961, 973 (D.C. Cir.), cert. granted on other grounds, 119 S. Ct. 402 (1998). Petitioner, however, cites no decision holding that Section 1346 is limited to schemes involving the services of public officials, and we are aware of none. Thus, contrary to petitioner's suggestion (Pet. 18-19), there is no conflict among the circuits on the question presented.

d. Contrary to petitioner's contention (Pet. 21-23), application of Section 1346 to private-sector relationships in general, and to petitioner's conduct in particular, raises no serious constitutional concerns. Petitioner cannot succeed in his vagueness challenge (Pet. 21) by demonstrating that hypothetical situations may exist in which application of the statute would be ambiguous. Rather, he must show that the statute failed to provide clear warning that his own conduct was proscribed. See *Chapman* v. *United States*, 500 U.S. 453, 467 (1991) ("First Amendment freedoms are not infringed * * *, so the vagueness claim must be evaluated as the statute is applied to the facts of this case."); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975) ("[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."); *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). Petitioner, who owed a fiduciary duty to his clients, engaged in an intentional scheme to bill them for campaign contributions that they did not authorize. Because a "person of ordinary intelligence," *Buckley* v.

Valeo, 424 U.S. 1, 77 (1976) (per curiam), would know that such conduct deprived the clients of their right to petitioner's honest services, application of Section 1346 did not violate due process.

There is likewise no merit to petitioner's contention that application of Section 1346 to private-sector relationships would "violate core principles of federalism" (Pet. 21) or exceed the authority of Congress (Pet. 22). Because conviction under Section 1346 requires proof that the mails were used in furtherance of the fraudulent scheme, the statute represents a permissible exercise of congressional power under the Postal Clause, U.S. Const. Art. I, § 8, Cl. 7. See *Badders* v. *United States*, 240 U.S. 391, 393 (1916); see also *Parr* v. *United States*, 363 U.S. 370, 389, 390 (1960). Petitioner's own conduct, moreover, involved economic transactions subject to federal regulation under the Commerce Clause.[7]

3. Petitioner contends (Pet. 23-27) that, in a mail fraud prosecution for deprivation of "the intangible right of honest services," 18 U.S.C. 1346, the government "must prove a violation of state law establishing and defining such a 'right.'" Pet. 23. He relies (*ibid.*) on *United States* v. *Brumley*, 116 F.3d 728 (5th Cir. 1997) (en banc), cert. denied, 118 S. Ct. 625 (1998), for the proposition that "services must be owed under state law and that the government must prove in a federal

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[7] There is also no merit in petitioner's suggestion (Pet. 19-20) that Section 1346 should not apply to this case because it involved political campaign contributions that are closely regulated by the States and "suffused with First Amendment concerns." Petitioner was not prosecuted for making political contributions. He was prosecuted for engaging in a scheme to bill clients for campaign contributions that they did not authorize—conduct that is wholly unprotected by the First Amendment.

prosecution that they were in fact not delivered." 116 F.3d at 734. That claim does not warrant review.

Petitioner never advanced any such claim in the courts below. Indeed, in an opinion rejecting one of petitioner's attacks on the indictment, the district court noted that petitioner "acknowledges that '*[s]tate law is irrelevant* to proving the essential elements of mail fraud.'" Pet. App. 56a. Nor did he argue on appeal that a state-law right is a necessary predicate of a Section 1346 violation. Rather, petitioner made a variety of evidentiary arguments about the government's use of Maryland election laws and restrictions placed on his response. See, *e.g.*, Pet. C.A. Br. 23-25, 26-27, 29-31. He also argued that the district court constructively amended the indictment by redacting references to Maryland election laws, *id.* at 28-29. But petitioner did not claim that Maryland election laws were (or should have been) in any way relevant in defining the "right of honest services" that petitioner, a lobbyist, owed to his clients. Nor did he make the argument (which he now advances in this Court) that the government had to prove under Section 1346 that petitioner had an obligation defined by state law to provide honest services to the victims of his fraudulent scheme.[8] Because peti-

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[8] In fact, in seeking reversal based on the government's asserted references to his violations of Maryland election laws, petitioner contended that "[t]hose improper references have nothing to do with the actual charges, i.e., the billing of expenses to clients." Pet. C.A. Br. 31; see also Pet. C.A. Reply Br. 17 (arguing that the government used election laws to prove more than motive and intent, thus committing error); *id.* at 26 (arguing that to establish a "deprivation of honest services under § 1346 * * * the defendant must have breached intentionally his [fiduciary] duty with the specific intent to defraud; that is, with the specific intent to fraudulently cause material harm to his principal"; no mention of

tioner never argued in the court of appeals that the government was required to prove a state-law source of a right to honest services, this case is not an appropriate vehicle for this Court to review any such claim. [9]

Even if it were properly presented here, petitioner's reliance on *United States* v. *Brumley*, *supra*, would be misplaced. The defendant in *Brumley*, an adjudicative officer within a state agency, accepted payments from lawyers who practiced before him and acted for those lawyers in his official capacity. The court of appeals stated that "[u]nder the most natural reading of the statute, a federal prosecutor must prove that conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state

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any requirement that the right to "services" be defined under state law).

[9] Petitioner cannot overcome his failure to advance in the court of appeals his claim that "state law [must be] the source of the 'right' to the 'services' at issue" (Pet. 24) merely by noting that the court of appeals stated that "[t]his Circuit previously has concluded that a prosecution for mail fraud does not require the Government to establish proof of any violation of an underlying state law or regulation." Pet. App. 19a. While this Court has discretion to consider an issue that was "passed upon" by the court of appeals, even though not pressed by a party, *United States* v. *Williams*, 504 U.S. 36, 41 (1992), there is no reason to permit petitioner to benefit from that rule. Petitioner made no effort to obtain reversal of his conviction on that ground; and the court of appeals simply restated circuit law (on the irrelevance of state law) as an introduction to its discussion (and rejection) of the quite different claims petitioner actually did present. See Pet. App. 19a-21a (rejecting claim that district court erred in admitting evidence of Maryland election laws); *id.* at 21a-26a (rejecting claim of prosecutorial misconduct in purported government argument that petitioner violated state election laws); *id.* at 26a-28a (rejecting claim of constructive amendment of indictment by deleting references to Maryland election law).

law"—*i.e.*, "the official must act or fail to act contrary to the requirements of his job under state law." 116 F.3d at 734. Because the defendant in *Brumley* was a state employee, the court did not have occasion to consider the application of Section 1346 to private-sector defendants. Nor does *Brumley*'s analysis logically apply in the private sector, where parties generally enter into relationships governed by express contracts and background duties and do not occupy positions created by state law.

In any event, a violation of state law is not an element of a mail fraud offense. See, *e.g.*, *United States* v. *Sawyer*, 85 F.3d 713, 726 (1st Cir. 1996); *United States* v. *Bryan*, 58 F.3d 933, 940 (4th Cir. 1995); *United States* v. *Margiotta*, 688 F.2d 108, 123-124 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983); *United States* v. *Von Barta*, 635 F.2d 999, 1007 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981); *United States* v. *Mandel*, 591 F.2d 1347, 1361-1362, aff'd, 602 F.2d 653 (4th Cir. 1979) (en banc), cert. denied, 445 U.S. 961 (1980); *United States* v. *Bush*, 522 F.2d 641, 646 n.6 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976); *United States* v. *Edwards*, 458 F.2d 875, 880 (5th Cir.), cert. denied, 409 U.S. 891 (1972).[10] As

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[10] Contrary to petitioner's contention (Pet. 10-11, 26-27), the district court properly excluded evidence intended to show petitioner's compliance with Maryland election laws. Evidence that petitioner complied with Maryland election laws would have provided no defense to the charge that he had fraudulently billed clients for expenses they did not authorize. Evidence concerning petitioner's understanding of the election laws, however, was properly admitted for the limited purpose of proving petitioner's intent. As the court of appeals explained, "[petitioner's] understanding of the election laws arguably explains his motive and intent for choosing the particular scheme which he utilized." Pet. App. 21a.

the court of appeals correctly recognized, "[s]ending a false bill to a third party through the mails with the necessary criminal intent is a classic violation of the mail fraud statute." Pet. App. 11a.

4. Relying on *United States* v. *D'Amato*, 39 F.3d 1249 (2d Cir. 1994), petitioner argues (Pet. 28-30) that the defendant must contemplate the prospect of harm to the victim in order to be guilty of mail fraud. The court in *D'Amato* held that "[m]isrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution," and that "the deceit must be coupled with a contemplated harm to the victim." *Id.* at 1257 (quoting *United States* v. *Starr*, 816 F.2d 94, 98 (2d Cir. 1987)). Any conflict between *D'Amato* and decisions of other circuits (see Pet. 28 & n.22; Pet. App. 9a-10a & n.5) provides no basis for further review in this case, however, since petitioner could not prevail even under the *D'Amato* standard. As the court of appeals explained, "[t]he contemplated harm is [petitioner's] fraudulent transfer to his clients of his cost of doing business which cost took the form of political contributions." *Id.* at 10a. The court noted that petitioner's clients "testified that they did not authorize and would not have knowingly paid for the political contributions [petitioner] made." *Id.* at 11a. That petitioner's clients may have been happy with the overall quality of his representation, and may have regarded the improper billings as relatively insignificant in comparison to the value of the services rendered (see Pet. 9-10), does not cast doubt on the court of appeals' analysis or negate any element of the charged offense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1999

Supreme Court, U.S.
FILED
APR 29 1999
CLERK

No. 98-1165

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BRUCE C. BEREANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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April 29, 1999

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This petition presents fundamental issues regarding 18 U.S.C. § 1346, Congress' response to this Court's decision in *McNally v. United States*, 483 U.S. 350 (1987). The issues are (1) whether the "intangible right of honest services" statute applies to the private sector, an extension that involves a radical expansion of federal power into areas of historic state concern and permits a federal prosecutorial club over the performance of every contract in the nation; and (2) whether a state law (or independent federal law) violation is required to give a defined, ascertainable meaning to the criminal proscription against the deprivation of an "intangible" legal "*right*."

This Court has not considered the validity, meaning, or scope of this cryptic, 27-word criminal law in the decade since *McNally* was decided and Congress responded. Both issues have "percolated" in the courts of appeals for years; indeed, courts of appeals have expressed grave concern about the first, and are squarely split on the second. On their face, both issues are important and recurring. The questions presented are ripe for this Court's review.

Because the prohibition is a criminal statute, doubt about its scope threatens personal liberty in the most direct sense. As the National Association of Criminal Defense Lawyers emphasized in its amicus brief supporting the petition, federal prosecutors are exploiting the uncertainty surrounding the "intangible right of honest services" statute to bring ever-more adventurous prosecutions, to provide a "catch-all" back-up theory, and to exact otherwise unavailable concessions and advantage.

This case, moreover, presents an especially compelling illustration of the problems with this amorphous crime. Petitioner stands convicted of violating the "intangible right of honest services" statute in his private contractual

relationships even though (1) the "intangible right of honest services" that he allegedly violated is nowhere defined in federal law; (2) the "intangible right" at issue likewise does not rest on any "right" defined by state law; and (3) the private contracting parties allegedly "deprive[d]" of their "intangible right" under the contract emphatically testified that they were not victims and that petitioner had rendered exemplary services in all respects. Where, then, is the clear boundary that permits the imposition of criminal sanctions?

The "intangible right of honest services," as asserted by the government in this case and prosecutors throughout the nation, is so low a threshold that it need only be defined in the mind of the federal prosecutor, with no reference to a "right" grounded in existing law — or even to the views of the private contracting parties whose "intangible right to honest services" purportedly is at issue. The confusion concerning this statute is so rampant, moreover, that, incredibly, in this case, the government was permitted to introduce evidence allegedly showing petitioner's "subjective" understanding of state law, while petitioner was denied an opportunity to present evidence concerning the actual "objective" meaning of state law and his compliance with it. Even the district court found the alleged fraud here to be "de minimis," "thin," and "obscure." Pet. 5, 11.

Having first attempted to evade review of these fundamental issues by waiving a response, the government now has confirmed that it has little to say on the merits as to why these fundamental and recurring issues should not now be reviewed by this Court. Instead, the government seeks to evade review by raising a smokescreen of supposed procedural objections. The government's objections are entirely spurious. Procedural nuances, of course, are relevant considerations; it never has been the case, however,

and must not be the case, that the government's mere invocation of supposed procedural obstacles, no matter how erroneous, creates a fog that defeats review in this Court. Upon scrutiny, the government's objections collapse, and do not detract from the pressing need for review.

Accordingly, in this reply, we will first address, and correct, the government's misconceptions regarding procedural obstacles. Once these spurious objections are put to one side, it is clear that twelve years after this Court's *McNally* decision, and eleven years after Congress sought to "reverse" *McNally*, it is of paramount importance that this Court consider fundamental issues regarding the scope and content of this federal criminal prohibition.

I. THE GOVERNMENT'S ATTEMPTS TO INVOKE SUPPOSED PROCEDURAL OBSTACLES ARE A RED HERRING.

The government's suggestions of procedural obstacles are fallacious. The government raises three principal objections: that petitioner's convictions may be permitted to rest on an alternative basis; that this Court previously has denied certiorari regarding the extension of Section 1346 to the private sector; and that the role of state law should not be addressed. All three are unfounded.

First, having brought an "intangible right of honest services" prosecution and argued to the jury that it was an independent basis for conviction, the government now frantically argues that this Court should disregard it. Opp. 7. The government acknowledges that (1) the indictment alleged criminal liability based on two separate legal theories — obtaining "money and property" (18 U.S.C. § 1341) and depriving "another" of the "intangible right of honest services" (18 U.S.C. § 1346); and (2) settled law requires

reversal of a criminal conviction where a case is submitted to the jury on alternative legal theories and one legal theory is invalid. Opp. 7; Pet. 23 n.19. Therefore, if the Section 1346 theory is legally invalid, then petitioner is entitled to relief.

Remarkably, however, the government now contends that the issues concerning Section 1346 need not be reviewed because the jury verdict "necessarily included" a money-or-property finding. Opp. 7-8. This contention is a desperate attempt to avoid review at all costs; it relies on conjecture and misstatement rather than analysis and fidelity to the record. The district court charged these two theories in the disjunctive.[1] The government, moreover, relied on "honest services" theories that did not depend on money-or-property. For example, the government variously argued to the jury that an "honest services" violation resulted because petitioner allegedly put his clients at risk of legal jeopardy,[2] and because petitioner concealed from his clients the *identity* of supported candidates.[3] Having thus relied on Section 1346 to impose "honest services" liability without relying on money-or-property, the government cannot now run from the consequences and attempt to avoid review by claiming that it did not mean what it (and the court) said.

Second, with regard to the government's expansion of the "intangible rights" crime to the private sector, the

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[1] *See, e.g.*, Tr. 1698 (THE COURT: "The Government must prove the defendant contemplated depriving another of the intangible right of honest service *or* harm to the property of another.") (emphasis added).

[2] *See, e.g.*, Tr. 1622 (THE GOVERNMENT: "Mr. Bereano put [his client] in violation of that law. Is that honest and faithful services?").

[3] *See, e.g.*, Tr. 1623 (THE GOVERNMENT: "Mr. Bereano was making a secret contribution [to a candidate not supported by his client]. Is that honest and faithful services?").

government suggests that this Court's previous denial of four petitions from one court of appeals decision somehow counsels against review here. Opp. 8. Most fundamentally, of course, a prior denial provides no independent basis to refuse review. *See, e.g., Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, 2144 & n.4 (1998) (grant of certiorari after repeated denials). In this case, moreover, the government's suggestion is especially weak: the government points to four *pro se* petitions from co-defendants that presented very different arguments from petitioner's, and did not arise in the contract-for-services context that is at issue here. Once again, the government's assertion is insubstantial, and provides no sound basis for this Court to deny review.

Third, with regard to the role of state law, the government contends that the issue has not been adequately preserved. Again, the government's contention is erroneous; disturbingly, moreover, in its apparent zeal to avoid review, the government has made an important, selective omission in its submission to this Court.

The government initially claims that the issue was not raised in the district court. The government's presentation, however, is erroneous, and troublingly incomplete. The government quotes from the district court's initial pre-trial decision. Opp. 13. Significantly, the government fails to mention that petitioner subsequently filed a motion to reconsider, relying on new authority, *in which petitioner explicitly argued that the indictment should be dismissed precisely because it did not rest on a state law violation*. CA JA 414. The government's selective omission is especially disturbing because the petition cited and quoted this motion. *See* Pet. 8 (quoting petitioner's motion arguing that a state law violation was a "*necessity*") (emphasis added).

Proceeding from this mischaracterization, the government also contends that the court of appeals context counsels against review. The government cannot deny, however, that (1) the court of appeals explicitly addressed the requirement of a state law violation (Pet. App. 19a); (2) controlling circuit precedent already had considered, and rejected, the requirement of a state law violation (*id.*) — *a point that the government repeatedly emphasized in its appellate brief* (Gov. CA Br. 7, 15-16); and (3) the role of state law was central to petitioner's appeal (in which, among other points, he vigorously objected to his inability to present evidence of the actual meaning of, and his compliance with, state law).

Undaunted, however, the government asserts that petitioner did not properly "dot the i's and cross the t's," and this Court should not address this fundamental issue. Even if no other circumstance were present, the court of appeals' "passing" on the issue plainly renders it ripe for this Court's review. *See, e.g., Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("It suffices for [this Court's] purposes that the court below passed on the issue presented," particularly when, as here, "the issue is . . . in a state of evolving definition and uncertainty . . . and [is] one of importance to the administration of federal law.").[4]

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[4] Rather than the casual "introduct[ory]" comment suggested by the government, the court of appeals' conclusion concerning state law was an important predicate, both to petitioner's objections concerning the government's use of "subjective" evidence of his alleged understanding of state law (which the court of appeals addressed) and to petitioner's objection that he was prohibited from introducing evidence of the actual meaning of, and his compliance with, state law (which the court of appeals failed to address). Furthermore, contrary to the government's claim, petitioner squarely raised the required relevance of state law. *E.g.*, Pet. CA Br. 23 ("The overriding non-ending error in this case below occurred because the prosecution bamboozled the trial judge into believing that Maryland election laws were 'irrelevant to [this] mail fraud prosecution.'").

Far from not being preserved, moreover, the proper role of state law was central to this case. Indeed, this case vividly illustrates the bizarre and distorted consequences produced by the confusion in current law: no state law violation was required; the government introduced evidence of the defendant's purported "subjective" understanding of state law; the defendant was barred from producing evidence of the actual meaning of, and his compliance with, state law.

The government again offers a baseless procedural objection in a transparent attempt to avoid review of these critical issues. The government's efforts to shield this statute from scrutiny should not be allowed to defeat review.

II. THE ISSUES PRESENTED WARRANT REVIEW.

Purged of its spurious procedural objections, the government's opposition has nothing of consequence to say as to why the issues presented do not warrant review.

1. The government's opposition is most notable for what it does *not* do: attempt to provide any coherent interpretation of the statutory language forming the basis for criminal liability. In *McNally*, this Court was emphatic in emphasizing the dangers of a free-floating "honest services" form of federal criminal liability and requiring Congress to legislate "clear[ly] and definite[ly]" before imposing such liability. 483 U.S. at 361. In response, Congress adopted the most *unclear* statement imaginable — a terse statute criminalizing the "depriv[ation]" of the "intangible right of honest services" of "another," with not a single word explicating or defining the statute's essential elements. This 27-word statute is riddled with ambiguity on every material term. Pet. 14-23. The government is simply mute about the language; its advocacy-by-avoidance strategy, however, does not minimize the glaring ambiguities permeating the statute.

Indeed, rather than attempt to provide any meaning to the statutory language, the government instead seeks to rely on legislative history to provide the requisite clarity that is missing from the statutory text. Opp. 10. Even leaving aside the obvious problems with the government's reliance on legislative history for this purpose (Pet. 20), the government's submission again is disturbingly incomplete and selective. For example, in quoting Representative Conyers, the government fails even to mention that Rep. Conyers enumerated specific types of cases to which the statute would apply — *none of which includes petitioner's private contractual relationships*. Pet. 20 n.16. Thus, the legislative history, to the extent it is relied upon at all, directly refutes the government's expansive interpretation.[5]

Similarly, rather than explicating the statutory language, the government argues that Section 1346 merely "restores" pre-*McNally* case law. Opp. 10. In addition to the other problems with this theory (Pet. 18), the government cannot overcome the fact that pre-*McNally* case law included inconsistent decisions, *including a decision holding that the "intangible right to honest services" theory does not extend to the private sector*. Pet. 19 n.13. The government attempts to avoid the implications of this holding by claiming that it was undermined by post-§ 1346 decisions (Opp. 9 n.5); post-enactment decisions, however, obviously do not detract from the significance of the fact that the case law *before* Section 1346 was enacted — on which the government professes to place such reliance — was

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[5] With regard to the lack of clarity, moreover, to the extent that Section 1346 can be interpreted as "either a meat axe or a scalpel," it "should reasonably be taken to be the latter." *United States v. Sun-Diamond Growers*, No. 98-131, 1999 WL 241704, *9 (U.S. Apr. 27, 1999); *see also* Pet. 21-22.

conflicting, thereby illustrating the inherent flaw in the government's "restor[ation]" theory.[6]

2. With regard to the expansion of Section 1346 beyond public officials to the private sector, the issue warrants this Court's review. The repeated expressions of concern by courts of appeals are well-founded: the government's position represents a stunning expansion of limitless prosecutorial discretion into areas historically regulated by the states (or by civil actions between contracting parties). Pet. 14-23. At the very least, such an expansion — with its profound consequences for liberty and on so thin a basis — should be considered by this Court.[7]

3. With regard to the requirement of a state law (or federal law) defining the "intangible right of honest services," there is a square Circuit split. *Compare, e.g.*, Pet. App. 19a *with United States v. Brumley*, 116 F.3d 728, 734 (5th Cir. 1997) (*en banc*), *cert. denied*, 118 S. Ct. 625 (1998). The government's weak response again confirms its desperation to avoid review. The government asserts that *Brumley* involved a public official, not a private individual. Opp. 14-15. The *en banc* decision requiring a state law violation, however, uses specific language that leaves no doubt about the requirements of Section 1346 in the Fifth Circuit. 116 F.3d at 733-34 (question is "the meaning of honest services as used in this federal statute"; "[w]e decide

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[6] Pre-*McNally* case law likewise includes authority requiring a state law violation. Pet 25 n.20. The government simply fails to address this authority.

[7] Contrary to the government's suggestion, a split in the Circuits obviously is not, and never has been, the sole criterion for certiorari jurisdiction. *Eastern Enterprises*, 118 S. Ct. at 2144 n.4. Particularly where, as here, the issue has far-reaching significance, involves personal liberty, and has been the repeated subject of expressed concern by courts of appeals, review is warranted.

today that services must be owed under state law").[8] Petitioner could not have been prosecuted in the Fifth Circuit under Section 1346 without a state law violation; that he nevertheless was convicted in the Fourth Circuit without such a violation — with no resolution of which Circuit correctly interpreted this federal criminal statute — is intolerable, and fundamentally inconsistent with basic principles of fairness and equal justice.

4. This petition also presents still another issue warranting review: whether contemplation of harm is a necessary component of mail fraud and an issue for which victim testimony is relevant. Pet. 28-30. The government makes much of the court of appeals' effort to sidestep this clear circuit split, but ignores the fact that the court's rationale for doing so — that victim testimony is "irrelevant" to the question (Pet. App. 10a) — is patently erroneous, and itself generates another circuit split. Pet. 29 n.24. Again, the government's advocacy-by-avoidance should not prevent review by this Court of these fundamental mail fraud issues.

The issues presented are important and recurring. They relate to the proper administration of an oft-utilized federal criminal statute; the court of appeals' resolution of each issue was erroneous; and petitioner has been wrongly deprived of his liberty. The issues warrant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] Tellingly, in its eagerness to avoid review, the government argues *for* a public/private distinction on the need for a state law violation, and *against* such a distinction on the statute's inapplicability to the private sector. Opp. 8-9, 15.

Respectfully submitted,

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April 29, 1999